Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

Petitioner,

v.

AMREP, INC.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the general provisions of the Federal Hazardous Substances Act preempt the Plaintiff's wrongful death action alleging that the Defendant's product did not contain proper warnings or adequate instructions for use.

2. Whether a request by the Consumer Product Safety Commission for voluntary compliance with the Commission's interpretation of the Federal Hazardous Substances Act had the force of federal law which preempted the Plaintiff's wrongful death product liability action based on Illinois law.

PARTIES

Richard Busch, husband of Melissa Busch, decedent, and administrator of her estate.

Amrep, Inc., manufacturer of "Misty," the product involved.

Graphic Color Corporation, the entity who had contracted with R. Busch Drum, Inc. for the cleaning of drums and the entity that directly supplied a certain quantity of "Misty" to R. Busch Drum, Inc. The Illinois Supreme Court affirmed the grant of summary judgment in favor of this defendant on state law grounds; and, as such, Graphic Color Corporation will have no interest in the outcome of the Petition.

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October Term, 1995

RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

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vs.

AMREP, INC.

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

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OPINIONS OF THE COURTS BELOW

Richard Busch, As Administrator of the Estate of Melissa Busch, Deceased v. Graphic Color Corporation and Amrep, Inc., 268 Ill.App.3d 763, 644 N.E.2d 839 (1995).

Richard Busch, As Administrator of the Estate of Melissa Busch, Deceased v. Graphic Color Corporation and Amrep, Inc., ___ Ill.2d ___, ___ N.E.2d ___ (Ill., February 15, 1996; No. 78662).

JURISDICTION

This Petition for Writ of Certiorari is brought from a Final Judgment and Opinion of the Supreme Court of the State of Illinois entered on February 15, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The Federal Hazardous Substances Act
(15 U.S.C. 1261 ff.)

(The pertinent portions of this statute are set out in the Appendix.)

STATEMENT OF THE CASE

This is a wrongful death action brought to recover damages for the death of Melissa Busch, the wife of Richard Busch. Richard Busch is the president of R. Busch Drum, Inc. which is a small family run business that buys, sells and brokers industrial drums. R. Busch Drum, Inc. had entered into a contract with one of its customers for the cleaning of certain drums and had been supplied with a product manufactured by the Defendant, Amrep, Inc., called "Misty Paint Stripper and Decal Remover." The main ingredient of "Misty" is methylene chloride which can cause unconsciousness and death if inhaled in certain quantities. Plaintiff's Decedent, Melissa, had undertaken to clean these

drums with "Misty" and died of acute methylene chloride intoxication.

Petitioner filed a wrongful death product liability action in the Circuit Court of DuPage County, Illinois, alleging that the product, "Misty," was defective and unreasonably dangerous under Illinois law in that it did not contain adequate instructions for use or adequate warnings of the danger of inhaling the product. The Defendant, Amrep, Inc., brought a Motion for Summary Judgment contending that Petitioner's action was preempted by the Federal Hazardous Act, 15 U.S.C. 1261 ff. The Defendant based its motion on the fact that the product contained a warning label that was substantially similar to a label which the Consumer Product Safety Commission had attempted to establish for methylene chloride by regulation. The proposed regulation was never adopted, and in its place the Consumer Product Safety Commission abandoned its attempts to establish the rule and announced that it would bring individual enforcement actions against any manufacturer or supplier of methylene chloride that did not contain the label of the abandoned regulation.

The Circuit Court of DuPage County granted the Defendant's Motion for Summary Judgment specifically finding that the Federal Hazardous Substances Act preempted the Plaintiff's state law product liability claim. The Court announced its ruling as follows:

> "I'll grant the motion for summary judgment. I believe this is beyond any

> doubt preempted by the Federal Hazardous Substances Act. . . . and I think the law is, in my opinion, unquestionably clear. I think you're preempted out of this court. I grant the motion for summary judgment." (R.C.-544) (Appendix pp. A-43 & A-44)

The Petitioner perfected an appeal to the Appellate Court of Illinois, Second Judicial District, contending that it was error for the Court to find that the Federal Hazardous Substances Act preempted Petitioner's action. In an opinion filed January 5, 1995, that Court affirmed the trial court's grant of summary judgment to the Defendant specifically holding that the Federal Hazardous Substances Act preempted the Plaintiff's state product liability action and specifically holding that the action of the Consumer Product Safety Commission regarding methylene chloride was a "facially valid regulation." (Appendix p. A-34) Following the denial of a Petition for Rehearing, Petitioner filed a Petition for Leave to Appeal to the Supreme Court of the State of Illinois which was allowed. The Supreme Court of the State of Illinois affirmed the trial court and the Appellate Court of Illinois, Second District, in an opinion which held that the Plaintiff's state product liability action was preempted by both the general provisions of the Federal Hazardous Substances Act and the actions of the Consumer Product Safety Commission in adopting its Notice of Interpretation and Enforcement regarding methylene chloride. (Appendix p. A-18)

REASONS FOR ALLOWING THE WRIT

THE OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS EXPANDS THE DOCTRINE OF FEDERAL PREEMPTION TO EXTINGUISH STATE LAW WHERE NO CONFLICT EXISTS WITH FEDERAL LAW. THE OPINION IS IN DIRECT CONFLICT WITH *Jenkins v. James B. Day and Company*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), AND THE OPINIONS OF THIS COURT IN *CSX Transportation, Inc. v. Easterwood*, 507 U.S.___, 123 L.Ed.2d 387, 113 S.Ct. 1732 (1993), AND *Freightliner Corporation v. Myrik*, ___U.S.___, 131 L.Ed.2d 385, 115 S.Ct. 1483 (1995).

Since this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S.___, 120 L.Ed.2d 407, 112 S.Ct. 2608 (1992), considerable confusion has arisen in lower state and federal courts over the preemption of state tort remedies in areas regulated by federal legislation. The opinion of the Illinois Supreme Court in this case in effect creates a presumption in favor of the preemption of state law remedies and is a dramatic and voluntary abandonment of traditional state police power in favor of the Congress.

At issue are the "requirements" of the Federal Hazardous Substances Act, 15 U.S.C. 1261 & 1262, (hereinafter FHSA). The FHSA was first enacted in 1960 in response to evidence that thousands of children were being poisoned, burned and otherwise accidentally injured through contact with unlabeled

or inadequately labeled hazardous household chemicals. *House Report (Interstate and Foreign Commerce Committee)* No. 89-2166, October 1, 1966, Cong. Record Vol. 112 (1966). In 1966 the Act was amended to include the ban as well as labeling of hazardous household chemicals and to include toys or other articles intended for use by children within the definitions of substances that may be declared hazardous. A limited preemption provision was added to the Act which provides as follows:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title]. (15 U.S.C. 1261n., Pl. 86-613) (Appendix p. A-47)

Under the terms of the statute no particular warning is required for any particular product. If a

product meets the definition of a "hazardous substance" under section (f) of 15 U.S.C. 1261 it must only contain a label that follows the general outline of 15 U.S.C. 1261(p). This section requires no specific information concerning any particular product but only requires that the label contain "signal words" briefly stating the principal hazard, "precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title" and "instruction, when necessary or appropriate, for first aid treatment." Where no regulation has been adopted pursuant to section 1262 to mandate a specific label for a specific product, the manufacturer is at its own risk in drafting warnings and instructions. It is the manufacturer's duty to create a label that adequately informs the ultimate consumer of what precautionary measures are necessary for the safe use of the product. If the warnings and instructions for use are not adequate, the product would be in violation of the Act.

Under the FHSA the Consumer Product Safety Commission (hereinafter CPSC) is charged with the enforcement of the statute. The CPSC first began the procedure to declare methylene chloride a hazardous substance on August 20, 1986, with a publication in the Federal Register (51 F.R. 29778) of the proposed amendment to the regulations issued under the FHSA. The notice also included the label that is at issue in this case.

On September 14, 1987, the Commission published a notice in the Federal Register (52 F.R.

34698) which it titled a "Notice of Interpretation and Enforcement Policy." (Appendix p. A-50) In that publication the Commission stated that it was suspending the rule making procedure regarding methylene chloride since it had received numerous objections to its proposed rule. The Commission announced:

> Rather than continue with the rulemaking, the Commission believes it is preferable to issue this statement of interpretation and enforcement policy. If the rulemaking proceeding were continued, there is a potential that there would be a subsequent adjudicatory hearing, as well as subsequent appeals to the Commission and to a court of appeals, which could delay the effective date of the rule for up to several years. (Appendix p. A-52)

The label at issue in this case was republished with the Commission stating that individual enforcement actions would not be brought against firms who used it. However, the Commission did admit that:

> This policy is not a binding rule, but is merely a notice of the Commission's intention to bring appropriate enforcement actions under the FHSA. In any such actions, any parties who disagree about whether any particular products containing methylene chloride

> are hazardous substances will have the opportunity to challenge the Commission's technical data and legal conclusions in Federal District Court. (Appendix p. A-56)

The Commission did not withdraw the proposed rule to amend its regulations to declare methylene chloride a hazardous substance and stated that it would reactivate the procedure to amend its regulations should voluntary compliance with its position not occur. The proposed rule is still pending before the Commission and has been subject to periodic notices of its pendency in the Federal Register. (57 F.R. 52313 (1992); 58 F.R. 25274 (1993); 58 F.R. 57271 (1993); 60 F.R. 24261 (1995)).

The opinion of the Illinois Supreme Court is in error in two respects. First, the Court holds that the general provisions of the FHSA under section 1261 (p) are "requirements" that are sufficient to extinguish Illinois tort law. The Court failed to understand that the only requirement of this section is that the manufacturer of the product supply it with an adequate warning for its use. Under Illinois law the duty of the manufacturer is the same and no conflict with the FHSA is possible. *Palmer v. Avco Distributing Corp.*, 82 Ill.2d 211, 412 N.E.2d 959, 964 (1980); *Suich v. H & B Printing Machinery, Inc.*, 185 Ill.App.3d 863, 541 N.E.2d 1206, 1216 (1989).

The second error of the Illinois Supreme Court was to transmute the failed attempt of the CPSC to obtain a regulation for methylene chloride into

positive Federal law that would preempt Illinois law and Petitioner's product liability action.

The only time that a specific label requirement is created under the FHSA is when the CPSC acts under 15 U.S.C. 1262 to declare a substance as hazardous and to further establish specific contents for a label for that specific product. In order to declare a substance as hazardous under the Act or to provide for specific warnings and instructions in a label, it is necessary for the CPSC to follow the procedure set out in section 1262(a)(2) of the Act which incorporates the regulatory scheme provided for in the Food Drug and Cosmetic Act, 21 U.S.C. 371. This procedure requires a public evidentiary hearing as to any proposed rule to which objections are filed with a right of appeal to the United States Circuit Court of Appeals. In order for the actions of the CPSC to preempt state law under the FHSA, their own actions must have the force of law - the issuance of a regulation pursuant to the terms of the Act. As the Court held in *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615 (2nd Cir.1992):

> . . . The Act does not purport to establish a comprehensive federal scheme of regulating hazardous substances found in the household. In fact, the FHSA does not ban any items or require any precautions. Instead, it authorizes regulations to be issued by the Consumer Product Safety Commission ("CPSC" or "Commission") pursuant to the Act, and sets guidelines

> to be followed by the CPSC in promulgating those regulations. (At 986 F.2d 617).

What the CPSC did with methylene chloride was to attempt an end run around the requirements of the FHSA. Previous attempts to do this with other products have been rejected as extra legal acts and voided by the courts. *Pactra Industries, Inc. v. Consumer Product Safety Commission*, 555 F.2d 677, 679 (9th Cir.1977); *Springs Mills, Inc. v. Consumer Product Safety Commission*, 434 F.Supp. 416, 435 (D.S.C., 1977).

In *Jenkins V. James B. Day and Company*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), the Supreme Court of the State of Ohio was presented with a case that was identical to the case at bar in all respects. In *Jenkins*, the decedent was found after using a product that was basically methylene chloride with the cause of her death being methylene chloride poisoning. In an action alleging inadequate warnings the trial court granted summary judgement to the defendant manufacturer holding that the FHSA preempted the plaintiff's action. The Ohio Court of Appeals reversed and the case reached the Ohio Supreme Court on the sole issue of whether the FHSA preempted the wrongful death product liability action based on state law. That Court reached the opposite conclusion from the Illinois Supreme Court holding that state product liability law was identical to the general requirements of the FHSA:

As we read appellee's claims relating to inadequate warning, their essence is that appellant did not provide a warning label which was reasonably adequate to inform a user of the product of the risks involved, and steps to be taken to avoid those risks. We find that the requirement appellee attempts to impose on appellant can be characterized as "identical to the labeling requirement under section 2(p)[Section 1261(p), Title 15, U.S. Code]," and therefore that appellee's products liability labeling claims are not preempted by the FHSA, Section 1261 note (Effect upon Federal and State Law,) Title 15, U.S. Code. (at 634 N.E.2d 1003).

The opinion of the Illinois Supreme Court is also in conflict with this Court's opinions in *CSX Transportation, Inc. V. Easterwood*, 507 U.S.___, 123 L.Ed.2d 387, 113 S.Ct. 1732 (1993) and *Freightliner Corporation V. Myrik*, ___U.S.___, 131 L.Ed.2d 385, 115 S.Ct. 1483 (1995). In *CSX Transportation*, this Court refused to find that the general provisions of the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. § 421 ff., preempted a state negligence claim under Georgia law against a railroad for failing to maintain adequate warning devices at a grade crossing. At issue were regulations issued by the Secretary of Transportation pursuant to the terms of the Act which provided that all warning devices

employed at grade crossings had to conform to standards set out in the Federal Highway Administration's Manual on Uniform Traffic Control Devices for Streets and Highways. However, for the crossing at issue, there existed no federal requirement as to the specific safety devices to be erected. Since the statute and regulations, as to this particular grade crossing, did not establish alternate duties incompatible with existing Georgia negligence law, this Court held that there could be no preemption of the plaintiff's negligence action.

To the same extent, the FHSA, in its general provisions, only requires that an adequate warning and instructions for use of the product be given on its label, but does not specify how this is to be accomplished. The content of a label for a particular product is left to the skill and discretion of the manufacturer of the product who publishes it at its own risk as to its effectiveness and adequacy.

CSX Transportation, Inc. v. Easterwood is also instructive as to what is necessary to work a preemption. An additional count of negligence alleged against the railway was that the train was going too fast. However, the undisputed evidence was that the speed of the train was within the maximum speed limit established for the section of track were the collision occurred as established under regulations promulgated by the FRSA. This Court held that since there was a specific regulation establishing a maximum speed any additional state regulation regarding the speed of trains was preempted.

In the case at bar the CPSC certainly could have followed through on its rule making procedure, declared methylene chloride a hazardous product and required that a particular label be used for all products containing it pursuant to section 1262. However, no such regulation has ever been adopted concerning methylene chloride; and it is only subject to the general labeling requirements of 1261(p).

Similarly in *Freightliner Corporation v. Myrik* this Court refused to find that a state product liability action was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. section 1381, et seq., (hereinafter the Safety Act) and the regulations issued thereunder. It was plaintiff's allegation that the tractor trailer unit manufactured by the defendant was defective under state product liability law in that it did not incorporate an ABS braking system that would have prevented the collisions. The defendants argued that the general provisions of the Safety Act and the power of the Secretary of Transportation to establish appropriate safety standards preempted the plaintiff's action. Since the Secretary had not chosen to require that the tractor trailer units be equipped with ABS braking systems, no state regulation, including product liability actions, could enforce such a requirement. This Court rejected such an argument holding:

> Petitioners' preemption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. First it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. (At 115 S.Ct. 1487)

Under the FHSA there is no requirement for any particular warning to be given concerning the use of methylene chloride. The only "requirement" is that adequate instructions for use and warnings be given. There exists nothing in the body of federal law that requires any particular type of warning or instruction for the chemical methylene chloride. The proposed regulation regarding methylene chloride can have no greater effect than the suspended regulation regarding stopping distances in *Freightliner Corporation*. Neither is an expression of positive federal law that can displace state law.

CONCLUSION

Allowing the opinion of the Supreme Court of the State of Illinois to stand in this case will create additional confusion and uncertainty on the issue of the federal preemption of state law tort claims. For reasons that are not apparent, the Supreme Court of the State of Illinois voluntarily relinquished considerable areas of its traditional police power in favor of a general federal statute and an ineffective declaration by the CPSC. The opinion of the Court is an open invitation to other courts to indulge in a

presumption in favor of rather than against the preemption of traditional state police power and is directly in conflict with prior opinions of this Court and the court of a sister state. It is respectfully prayed that this Court grant the Petition for a Writ of Certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

Richard BUSCH, Adm'r of the Estate of Melissa Busch, Deceased, Appellant,

v.

GRAPHIC COLOR CORPORATION et al., Appellees.

No. 78662.

Supreme Court of Illinois.

Feb. 15, 1996.

Appeal, Appellate Court, Second District, DuPage County, Richard A. Lucas, Judge, AC2-94-0141, TR91L207, O-010595.

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Wylie, Mulherin, Rehfeldt & Varchetto, Wheaton, Stephen A. Rehfeldt, William J. Wylie and Associates, Wheaton, for Grahic Color Corporation.

Jane B. McCullough, Altheimer & Gray, Chicago, for AMREP, Inc.

Chief Justice BILANDIC delivered the opinion of the court:

*1 The plaintiff, Richard Busch, as administrator of the estate of his deceased wife, Melissa, filed this wrongful death action in the circuit court of Du Page County against AMREP, Inc. (AMREP), and Graphic Color Corporation (Graphic Color) for the benefit of himself, the surviving spouse. Melissa died of methylene chloride intoxication after using a paint stripper manufactured by AMREP while on the premises of R. Busch Drum, Inc. (Busch Drum), a corporation of which Richard Busch is president and part owner. Prior to Melissa's death, several cases of the paint stripper had been supplied to Busch Drum by a representative of Graphic Color. No claim or action for Melissa's death was brought by the plaintiff against Busch Drum.

The trial court entered summary judgment in favor of the

defendants on the ground that the common law tort claims on which the plaintiff's wrongful death action is based are preempted by provisions of the Federal Hazardous Substances Act (FHSA) (15 U.S.C. s 1261 et seq. (1988)). The appellate court affirmed. (268 Ill.App.3d 763, 206 Ill.Dec. 71, 644 N.E.2d 839.) We allowed the plaintiff's petition for leave to appeal (145 Ill.2d R. 315).

FACTS

Busch Drum is a small corporation engaged in the business of buying, selling, and brokering industrial drums. Richard Busch is the president of Busch Drum, and he and his mother, Carol Busch, are the sole owners and the only employees of the company. Although Richard and Melissa were married, Melissa was not connected with Busch Drum in any capacity.

Graphic Color is a printing company which uses large ink vats in its printing operations. In the summer of 1988, nearly a year before Melissa's death, Busch Drum entered into an agreement with Graphic Color to periodically clean its ink vats. This task, however, was not part of Busch Drum's regular business operations. Richard, who was Busch Drum's only production employee, undertook the task of cleaning the vats in the company's garage. Graphic Color delivered the vats to Busch Drum along with rags, dust masks, and cleaning solvent, and a Graphic Color representative instructed Richard on how to clean the vats.

The solvent was a product called "Misty Paint Stripper and Decal Remover" (Misty Paint Stripper) manufactured by AMREP. The paint stripper contained a variable amount of methylene chloride, which AMREP purchased from Dow Chemical Corporation, with a maximum concentration of 77%. Richard was given five cases of Misty Paint Stripper for each vat to be cleaned. Each case contained 12 cans of the product, and Richard was told by the Graphic Color representative that it would take 60

cans to clean each vat.

Melissa was not an employee, agent, or independent contractor of Busch Drum but helped out in the office from time to time without pay. On occasion, Melissa saw Richard cleaning the ink vats. However, she was never asked or required to clean the vats.

On March 20, 1989, the day of Melissa's death, Richard went to the office early in the morning before leaving to meet with customers. Melissa was at home at this time. When Richard returned to the office at approximately 12:20 p.m., he found Melissa unconscious in the garage near one of the vats. Several empty cans of Misty Paint Stripper and numerous rags were lying about; Melissa was wearing a dust mask and was covered with ink. According to Richard, the windows were open and the fans were on when he found Melissa. The medical examiner's report, however, indicated that Richard had told an investigator that the garage had "no mechanical ventilation" and that "all windows and doors were closed" when he returned to find Melissa. Richard and his mother both submitted affidavits stating that Melissa had not been requested or authorized to clean the ink vats. Richard further stated that he was "totally unaware of her presence" on the premises until he returned to find her. The cause of Melissa's death was determined to be methylene chloride intoxication.

*2 In his affidavit, Richard stated that, had he known the Misty Paint Stripper could be fatal if inhaled, he "would not have accepted the assignment" to clean the vats. He also indicated that he was told by representatives of Graphic Color that he could use as much of the product as was necessary to clean the vats and that the only safety equipment needed was a dust mask.

Robert Davis, a chemist which the plaintiff retained as an expert witness, explained in an affidavit that methylene chloride "is poisonous when inhaled in that it causes the

inhibition of the release of carbon dioxide from hemoglobin in the blood which prevents the hemoglobin from picking up oxygen." He stated that inhalation of a sufficient amount of the chemical can cause unconsciousness and even death. According to Davis, the risk of cancer which has also been tied to methylene chloride is a risk "separate and apart from its risk as a poisonous substance when inhaled." Accordingly, a warning separate from that concerning the chemical's potential carcinogenic effects needed to be included in the Misty Paint Stripper's label. Davis reviewed the warning appearing on the Misty Paint Stripper label, which reads as follows:

[Front Panel]
"WARNING
VAPOR HARMFUL. CONTENTS UNDER PRESSURE. KEEP OUT OF REACH OF CHILDREN. Read other precautions on back panel."

[Back Panel]
"WARNING
Contains methylene chloride which has been shown to cause cancer in certain laboratory animals. Risk to your health depends on level and and duration of exposure. Use this product outdoors if possible. If you must use it indoors, open all windows and doors or use other means to ensure fresh air movement during application and drying. If properly used, a respirator may offer additional protection. Obtain professional advice before using. A dust mask does not provide protection against vapors. Do not use in basement or other unventilated areas. Avoid contact with skin and eyes. First Aid Treatment: Contains Methylene Chloride and less than 4% Methyl Alcohol. In case of eye contact, flush with water thoroughly. Call a physician immediately. If swallowed, induce vomiting by placing fingers or spoon at back of throat. Call physician immediately. Keep patient warm. Avoid inhalation of spray mist. If

overcome, move patient to fresh air. Call physician immediately."

Based on a reasonable degree of scientific certainty, Davis concluded that the label was insufficient in that it failed to specifically warn the user that the product can cause death by asphyxiation if a sufficient amount of methylene chloride is inhaled. He further concluded that in order for the product to be reasonably safe for its intended use, it would have to be accompanied by warnings substantially similar to those contained in the manufacturer's safety data sheet which Dow Chemical provided to AMREP. Among other things, the data sheet indicates that methylene chloride vapor is "heavier than air and will collect in low areas such as * * * storage tanks and other confined areas." The data sheet also indicates that accumulated vapors "can readily cause unconsciousness or death." Davis explained that additional warnings such as these are essential because methylene chloride has a narcotic effect which gives the user a false sense of well-being prior to the time he loses consciousness. According to Davis, a general warning about ventilation is "insufficient."

*3 In his amended complaint, the plaintiff based his wrongful death claim against AMREP on the doctrine of strict product liability. Specifically, the plaintiff asserted that the Misty Paint Stripper was defective and unreasonably dangerous because the product's label failed to warn that the inhalation of the paint stripper vapors would cause death. He also asserted that the label contained inadequate instructions regarding how to safely use the product. According to the plaintiff, the defective and unreasonably dangerous condition of the product proximately caused Melissa's death.

The plaintiff's wrongful death claim against Graphic Color sounded in negligence. Specifically, the plaintiff asserted that Graphic Color was negligent in failing to

warn Busch Drum that the inhalation of Misty Paint Stripper could prove fatal and in failing to properly instruct Busch Drum as to the proper use of the product. According to the plaintiff, Graphic Color's negligent conduct proximately caused Melissa's death.

AMREP and Graphic Color filed separate motions for summary judgment contending that the plaintiff's allegations of strict product liability and negligence were preempted by the FHSA. In addition, Graphic Color argued that it owed no legal duty to Melissa to warn of the dangers of using the Misty Paint Stripper because Melissa was not one whom Graphic Color could have reasonably anticipated would use the product. In granting the defendants' motions, the trial court agreed that the FHSA preempted the plaintiff's State-law tort claims. The appellate court affirmed. 268 Ill.App.3d 763, 206 Ill.Dec. 71, 644 N.E.2d 839.

ANALYSIS

[1][2][3] Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. (Ill.Rev.Stat.1989, ch. 110, par. 2-1005(c); Espinoza v. Elgin, Joliet & Eastern Ry. Co. (1995), 165 Ill.2d 107, 113, 208 Ill.Dec. 662, 649 N.E.2d 1323; Gilbert v. Sycamore Municipal Hospital (1993), 156 Ill.2d 511, 517- 18, 190 Ill.Dec. 758, 622 N.E.2d 788.) The purpose of summary judgment is to determine whether a question of fact exists. (Gilbert, 156 Ill.2d at 517, 190 Ill.Dec. 758, 622 N.E.2d 788.) Although summary judgment is encouraged to aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and should thus be allowed only when the movant's right is clear and free from doubt. (Purtill v. Hess (1986), 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489

N.E.2d 867.) As in all cases involving summary judgment, our review of the evidence is de novo. Espinoza, 165 Ill.2d at 113, 208 Ill.Dec. 662, 649 N.E.2d 1323.

The plaintiff contends that the appellate court erred in upholding the trial court's grant of summary judgment for the defendants on the basis that his tort claims were preempted by provisions of the FHSA. For the reasons which follow, we affirm the grant of summary judgment in favor of AMREP and Graphic Color. As to AMREP, we premise our holding on the doctrine of Federal preemption. As to Graphic Color, however, our holding is based on the principles set forth in section 388 of the Restatement of Torts (Restatement (Second) of Torts s 388 (1965)).

A. AMREP

*4 [4][5] The supremacy clause contained in article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land, * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) Thus, where State law conflicts with Federal law, the former is "without effect." (Maryland v. Louisiana (1981), 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576, 595.) The United States Supreme Court recently revisited the issue of Federal preemption in Cipollone v. Liggett Group, Inc. (1992), 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407. In Cipollone, the Court reiterated that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.' " (Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617, 120 L.Ed.2d at 422, quoting Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459.) Accordingly, the Court noted, " ' "[t]he purpose of Congress is the ultimate touchstone"

' of pre-emption analysis. [Citations.]" Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617, 120 L.Ed.2d at 422; accord Spitz v. Goldome Realty Credit Corp. (1992), 151 Ill.2d 71, 74, 175 Ill.Dec. 727, 600 N.E.2d 1185; Castillo v. Jackson (1992), 149 Ill.2d 165, 173-74, 171 Ill.Dec. 471, 594 N.E.2d 323 ("It is the power and intent of Congress to preempt an area of law which triggers the requirements of the supremacy clause" (emphasis in original)).

[6][7] Congress' intent to preempt State law may be manifested "by express provision, by implication, or by a conflict between federal and state law." (New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance (1995), 514 U.S. ----, ----, 115 S.Ct. 1671, 1676, 131 L.Ed.2d 695, 704.) However, "[w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' [citation], 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. [Citation.]" Cipollone, 505 U.S. at 517, 112 S.Ct. at 2618, 120 L.Ed.2d at 423.

[8] In addressing the preemptive scope of the FHSA, we note preliminarily that the decisions of the Federal courts interpreting a Federal act such as the FHSA are controlling upon Illinois courts, "in order that the act be given uniform application." (Bowman v. Illinois Central R.R. Co. (1957), 11 Ill.2d 186, 200, 142 N.E.2d 104; Boyer v. Atchison, Topeka & Santa Fe Ry. Co. (1967), 38 Ill.2d 31, 34, 230 N.E.2d 173; Elgin, Joliet & Eastern Ry. Co. v. Industrial Comm'n (1956), 9 Ill.2d 505, 507, 138 N.E.2d 553; see also Hiles v. Norfolk & Western Ry. Co. (1994), 268 Ill.App.3d 561, 563, 205 Ill.Dec. 952, 644 N.E.2d 508; Golden Bear Family Restaurants, Inc. v. Murray (1986), 144 Ill.App.3d 616, 620, 98 Ill.Dec. 459, 494 N.E.2d 581.)

Having so noted, we proceed now to determine how the Federal courts have construed the FHSA's preemptive scope.

*5 In the recent case of Moss v. Parks (4th Cir.1993), 985 F.2d 736, the Fourth Circuit Court of Appeals set forth the relevant legislative history of the FHSA and its preemption provision. The court explained:

> "The FHSA was enacted in 1960. The purpose of the law was to 'provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use.' House Comm. On Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R.Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), reprinted in 1960 U.S.C.C.A.N. 2833, 2833. As enacted the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. Congress recommended 'a limited preemption amendment which would encourage and permit states to adopt requirements identical with the federal requirements for substances subject to the Federal Act, and to enforce them to complement Federal enforcement ...' House Comm. On Interstate and Foreign Commerce, Child Protection Act of 1966, H.R.Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S.C.C.A.N., 4095, 4096." (Emphasis added.) Moss, 985 F.2d at 739.

The 1966 amendments to the FHSA added the following preemption provision, at issue in the present case:

> "[I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or

injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title]." 15 U.S.C. s 1261 note (b)(1)(A) (1988).

[9] In discussing Congress' purpose for enacting the FHSA's preemption provision, the Ninth Circuit Court of Appeals, in Chemical Specialties Manufacturers Association, Inc. v. Allenby (9th Cir.1992), 958 F.2d 941, noted:

"On the one hand, a national safety standard would ease the burden of compliance for chemical product manufacturers by relieving them from the burden of complying with fifty-one separate regulatory schemes promulgated by each state and the federal government. On the other hand, such a standard would take police powers away from the states who best know how to serve the interests of their citizenry. The preemption clause in [the] FHSA balances these competing concerns by leaving cautionary labeling requirements to the federal government while allowing states to regulate the sale and use of hazardous chemicals." (Emphasis added.) Allenby, 958 F.2d at 950.

*6 [10] It is clear from the foregoing that Congress intended to preempt all nonidentical State laws proposing cautionary labeling requirements addressing the same risk of illness or injury as the FSHA. The question remains, however, whether the "state laws" which the FHSA's preemption provision is intended to preempt include common law tort claims based on a failure to warn which seek to impose labeling requirements different from those imposed under the Federal act. The plaintiff argues

that such claims are not included in the category of laws subject to preemption. We find, however, that under the United States Supreme Court's holding in Cipollone and the Federal decisions which have followed since Cipollone, such claims are subject to preemption.

In Cipollone, a plurality of the Supreme Court concluded that Federal law can, under some circumstances, preempt common law tort actions. At issue in Cipollone was whether the Federal Cigarette Labeling and Advertising Act and its successor, the Public Health Cigarette Smoking Act of 1969, served to preempt the petitioner's common law tort claims. Both statutes contained express preemption provisions. Although the Court found that the predecessor statute had no preemptive effect on State-law tort actions, it concluded that the preemption provision of the 1969 statute did. That provision reads as follows:

"(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Emphasis added.) See Cipollone, 505 U.S. at 515, 112 S.Ct. at 2617, 120 L.Ed.2d at 422.

In holding that the above provision was broad enough to preclude common law tort actions, the plurality rejected the petitioner's contention that such actions imposed neither "requirement[s]" nor "prohibition[s]." The plurality dismissed the petitioner's assertion that Congress intended only to preempt State statutes, injunctions, and executive pronouncements and not tort actions pursued in a judicial forum. (Cipollone, 505 U.S. at 521, 112 S.Ct. at 2620, 120 L.Ed.2d at 426.) On this point, the Court declared:

"The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those

words easily encompass obligations that take the form of common-law rules. As we noted in another context, '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' [Citation.]

* * *

Moreover, common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions.' * * * [I]t is the essence of the common-law to enforce duties that are either affirmative requirements or negative prohibitions. We therefore reject petitioner's argument that the phrase 'requirement or prohibition' limits the 1969 Act's preemptive scope to positive enactments by legislatures and agencies." (Emphasis in original.) Cipollone, 505 U.S. at 521-22, 112 S.Ct. at 2620, 120 L.Ed.2d at 426.

*7 The Court went on to state the standard to be applied in determining which, if any, of the petitioner's common law claims were preempted by the 1969 act. The Court explained that "[t]he central inquiry in each case is * * * whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." (Cipollone, 505 U.S. at 523-24, 112 S.Ct. at 2621, 120 L.Ed.2d at 427.) Applying that test to each of the common law claims raised by the petitioner, the Court held that the petitioner's failure-to-warn theory was preempted because it sought to impose additional or more clearly stated warnings relating to cigarettes than those imposed by the 1969 act. Cipollone, 505 U.S. at 524, 112 S.Ct. at 2621-22, 120 L.Ed.2d at 428. [FN1]

Since Cipollone, the majority of Federal courts that have addressed the issue of Federal preemption over State common law claims based on, among other things, a failure to warn, where the preemption provision at issue is similar or identical to the one in Cipollone, have found the State-law claims to be preempted. See, e.g., Taylor AG Industries v. Pure-Gro (9th Cir.1995), 54 F.3d 555; Bice v. Leslie's Poolmart, Inc. (8th Cir.1994), 39 F.3d 887; National Bank of Commerce v. Kimberly-Clark Corp (8th Cir.1994), 38 F.3d 988; MacDonald v. Monsanto Co. (5th Cir.1994), 27 F.3d 1021; Gile v. Optical Radiation Corp. (3rd Cir.1994), 22 F.3d 540; Mendes v. Medtronic, Inc. (1st Cir.1994), 18 F.3d 13; Worm v. American Cyanamid Co. (4th Cir.1993), 5 F.3d 744; King v. E.I. Dupont De Nemours & Co. (1st Cir.1993), 996 F.2d 1346; Shaw v. Dow Brands, Inc. (7th Cir.1993), 994 F.2d 364; Moss, 985 F.2d 736, Papas v. Upjohn Co. (11th Cir.1993), 985 F.2d 516; Stamps v. Collagen Corp. (5th Cir.1993), 984 F.2d 1416; Arkansas- Platte & Gulf Partnership v. Van Waters & Rogers, Inc. (10th Cir.1993), 981 F.2d 1177.

[11] More pertinent to this case, a number of these Federal decisions have addressed the effect of the preemption provision under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. s 136 et seq. (1988)) and have found no notable difference between the preemption language in the 1969 act at issue in Cipollone and that found in the FIFRA. (See, e.g., Taylor, 54 F.3d 555; Bice, 39 F.3d 887; MacDonald, 27 F.3d 1021; Worm, 5 F.3d 744; King, 996 F.2d 1346, Shaw, 994 F.2d 364; Papas, 985 F.2d 516; Arkansas-Platte, 981 F.2d 1177.) The preemption language of the FIFRA provides that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." (7 U.S.C. s 136v(b) (1988).) The FIFRA provision is substantively equivalent, in our view, to the FHSA's

preemption provision. Indeed, Federal courts which have addressed the issue are in accord with this finding. See, e.g., Moss, 985 F.2d at 740 n. 3 ("The preemption language of the two statutes is nearly identical"); Chemical Specialties, 958 F.2d at 945 ("The preemption issues arising under FHSA are identical to those arising under FIFRA"); see also DeHaan v. Whink Prods. Co. (N.D.Ill. January 25, 1994), No. 91-C-0014, 1994 WL 24322 (the preemption provisions under FHSA and FIFRA are "effectively identical").

*8 [12] Thus, applying Cipollone and its progeny to the present case, we conclude that the FHSA's preemption provision precludes plaintiffs from bringing common law tort claims which seek to impose cautionary labeling requirements for hazardous substances which are different from and are designed to protect against the same risk of illness or injury as those imposed by the FHSA. We must now consider whether the plaintiff's claims against AMREP seek to impose labeling requirements that are different from those imposed under the FHSA. Under section 1261(p) of the FHSA, the labeling of a hazardous substance must:

"(1) * * * state[ ] conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name; (C) the signal word 'DANGER' on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word 'WARNING' or 'CAUTION' on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as 'Flammable', 'Combustible', 'Vapor Harmful', 'Causes Burns',

'Absorbed Through Skin', or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word 'poison' for any hazardous substance which is defined as 'highly toxic' by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) 'Keep out of the reach of children' or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard * * *." 15 U.S.C. s 1261(p)(1) (1988).

[13] The plaintiff maintains that the labeling provisions of section 1261(p) impose no "requirements" with respect to the cautionary labeling of paint strippers, such as the Misty Paint Stripper at issue here, because they set forth no specific precautions for any specific type of product. The plaintiff argues that the labeling provisions of section 1261(p) are more in the nature of noncompulsory guidelines to which companies can refer in crafting the cautionary labels for the hazardous substances they manufacture. We reject this contention. Despite the fact that the provisions are couched in general terms encompassing every type of hazardous substance, they are nonetheless requirements for the cautionary labeling of hazardous substances, which the plaintiff concedes includes Misty Paint Stripper. Indeed, Congress made this fact clear by referring to the provisions of section 1261(p) as cautionary labeling "requirements" in the language of the FHSA's preemption provision. See 15 U.S.C. s 1261 note (b)(1)(A) (1988).

*9 [14] Moreover, the Consumer Product Safety

Commission (Safety Commission)--the Federal agency responsible for administering the FHSA--offered a detailed labeling example for paint strippers containing methylene chloride which it concluded conformed to the labeling requirements of section 1261(p) of the FHSA. Apart from evidencing that the provisions of section 1261(p) are to be treated as labeling "requirements," the Safety Commission's labeling example illustrates how those requirements are met for products like Misty Paint Stripper.

The promulgation of the labeling example was prompted by a 1985 petition filed by the Consumer Federation of America seeking to have household products containing methylene chloride declared "hazardous substances" and to have them banned pursuant to section 1261(q). (See Petition HP 85-1, Petition Requesting Ban of Household Products Containing Methylene Chloride, 53 Fed.Reg. 14,590 (1988).) Subsequently, the Safety Commission, in August of 1986, proposed a rule to declare paint strippers and other household products containing other than nominal levels of methylene chloride to be hazardous substances. Household Products Containing Methylene Chloride; Status as Hazardous Substances, 51 Fed.Reg. 29,778 (1986).

In August 1987, the Safety Commission determined that there was insufficient controversy to warrant a rulemaking proceeding on the issue and published a notice of interpretation and enforcement policy (hereinafter 1987 Notice) stating its view that household products containing methylene chloride are hazardous substances and are thus subject to the FHSA's labeling requirements. (Labeling of Certain Household Products Containing Methylene Chloride; Statement of Interpretation and Enforcement Policy, 52 Fed.Reg. 34,698 (1987).) Discussing the labeling requirements under the FHSA for products containing methylene chloride, the Safety

Commission set forth a "Detailed Example of Labeling for Paint Strippers" and noted that the label was the work product of industry and consumer interest representatives working with the Safety Commission's staff. (52 Fed.Reg. 34,698, 34,702 (1987).) The detailed example offered by the Safety Commission provides as follows:

"[Front Panel]

CAUTION: Vapor Harmful, Read Other Cautions and HEALTH HAZARD INFORMATION on Back Panel [or equivalent language]

[Back Panel]

Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals. Risk to your health depends on level and duration of exposure.

[Or equivalent language]

[The back panel labeling given above would be placed separately from use precaution information such as the following.]

Use this product outdoors, if possible. If you must use it indoors, open all windows and doors or use other means to ensure fresh air movement during application and drying.

If properly used, a respirator may offer additional protection. Obtain professional advice before using. A dust mask does not provide protection against vapors.

Do not use in basement or other unventilated area.

Open container carefully and close after each use. Clean up rags, papers, and waste promptly. Allow solvent to evaporate, then dispose of in metal containers."

*10 [15] The Safety Commission declared in its 1987 Notice that the above labeling language fulfills the requirements of section 1261(p) of the FHSA. (52 Fed.Reg. 34,698, 34,702 (1987).) The Safety Commission's labeling example represents an interpretation of a statute by the administrative agency charged with administering the FHSA. This court has held that an administrative

agency's interpretation of a statute it is responsible for administering "should be accorded considerable deference" so long as Congress has not expressed its intent as to the issue and provided the agency's interpretation is reasonable. See Spitz, 151 Ill.2d at 76, 175 Ill.Dec. 727, 600 N.E.2d 1185; see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984), 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694, 704.

[16] As stated, the Safety Commission has concluded that its detailed labeling example satisfies the cautionary labeling requirements of section 1261(p)(1) of the FHSA. (52 Fed.Reg. 34,698, 34,702 (1987).) In the view of the Safety Commission, therefore, nothing more is required of labels for paint strippers containing methylene chloride under the FHSA, other than what is stated in its example. We hold that it is appropriate to defer to the Safety Commission on this point since Congress has yet to express its view on the issue and because we find the Safety Commission's interpretation to be reasonable.

[17] As the facts indicate, the label contained on the Misty Paint Stripper product used by Melissa was virtually identical to the detailed example set forth by the Safety Commission. The labeling requirements which the plaintiff seeks to impose on AMREP, namely, a warning that inhalation of Misty Paint Stripper "would cause death" and "adequate instructions for its use" (implying that the existing instructions are not adequate), constitute requirements that are not "identical" to those required under section 1261(p)(1). (See 15 U.S.C. s 1261 note (b)(1)(A) (1988).) As the Safety Commission's interpretation of section 1261(p)(1) reveals, the additional information which the plaintiff seeks to require AMREP to place on the label is not mandated by the FHSA. Accordingly, the plaintiff's tort claims against AMREP, based on a failure to warn, are preempted.

[18] As a final argument, however, the plaintiff contends

that his claims are not, in fact, preempted because the information he alleges should have been included on the Misty Paint Stripper label covers a risk of injury different from the risk of injury against which the labeling requirements of the Federal act were designed to protect. The plaintiff asserts that the Safety Commission's own comments in its 1987 Notice reveal that the risk of injury which the FHSA's cautionary labeling requirements for paint strippers were intended to protect against was the risk of cancer, not the risk of asphyxiation, which Melissa encountered.

We agree with the plaintiff that under the subject preemption provision, only those labeling requirements which are "designed to protect against the same risk of illness or injury" as that targeted by the Federal statute are preempted. (Emphasis added.) (15 U.S.C. s 1261 note (b)(1)(A) (1988).) We also agree that the Safety Commission's primary focus in issuing its 1987 Notice was, in fact, to warn consumers of the carcinogenic risks posed by methylene chloride found in products such as paint strippers. We disagree, however, that the risk of cancer was the Safety Commission's sole focus. The Safety Commission has expressly acknowledged its concern with the risk to individuals of acute inhalation intoxication posed by methylene chloride vapors. This concern is evidenced by statements made by the Safety Commission in 1992 when it responded to several individuals' comments regarding the preemptive scope of the FHSA. In responding to one individual's comment that the labeling requirements of the FHSA were too weak and vague to preempt State laws, the Commission responded:

> *11 "The requirements of the FHSA are not vague. * * * [T]he labeling must communicate to the consumer an understanding of the potential principal hazard or hazards presented by the product in order to avoid being

misbranded and subject to legal action.

* * *

The cautionary label required under [section 1261(p) of] the FHSA must present a balanced perspective of the potential hazards of the product. Many products which may cause chronic health effects may also be acutely toxic and present physical hazards, such as flammability." (Emphasis added.) 57 Fed.Reg. 46,626, 46,664 (1992).

The Commission then went on to highlight the labeling requirements under the FHSA for paint strippers containing methylene chloride:

"The suggested labeling for methylene chloride paint strippers had to take into consideration the product's acute inhalation toxicity in addition to the carcinogenicity hazard. Therefore, the suggested front panel label statement is 'VAPOR HARMFUL' with the instruction 'Read Other Cautions and HEALTH HAZARD INFORMATION on back panel' and the back panel statement is 'Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals.' For products where the only hazard is carcinogenicity and the evidence of increased risk of cancer to humans is clear, the labeling would be more straightforward." (Emphasis added.) 57 Fed.Reg. 46,626, 46,664 (1992).

As the foregoing comments of the Safety Commission indicate, the cautionary labeling requirements of the FHSA for paint strippers containing methylene chloride are intended to protect against the same risk at issue here, namely, the risk of acute inhalation toxicity. Accordingly, we find the plaintiff's final argument to be without merit.

For the reasons stated, we hold that the plaintiff's failure-to-warn claims against AMREP, upon which he bases his wrongful death action, are preempted by the FHSA. Our

holding today comports with Congress' stated goal in enacting the Federal statute and the preemption provision contained therein of providing nationally uniform requirements for the cautionary labeling of hazardous substances like the paint stripper at issue here. Accordingly, we affirm the judgment of the appellate, which affirmed the circuit court's grant of summary judgment in favor of AMREP.

B. Graphic Color

[19] We also affirm that portion of the judgment of the appellate that affirmed the circuit court's grant of summary judgment in favor of Graphic Color, although for reasons different from those relied upon by the courts below. It is within this court's power and discretion to affirm the decision below on any ground warranted, regardless of whether that ground was relied on by the lower courts or whether the reasons given by those courts were correct. Federal Deposit Insurance Corp. v. O'Malley (1994), 163 Ill.2d 130, 140, 205 Ill.Dec. 534, 643 N.E.2d 825; Messenger v. Edgar (1993), 157 Ill.2d 162, 177, 191 Ill.Dec. 65, 623 N.E.2d 310.

[20] We decline to resolve the issue of Graphic Color's liability on the basis of Federal preemption because the plaintiff's claims against this defendant appear to stem not from the label affixed to the Misty Paint Stripper but from a general failure to warn of the product's dangers and the failure to properly instruct as to its proper use. Thus, unlike the claims against AMREP, the allegations against Graphic Color do not on their face seek to impose cautionary labeling requirements with respect to the Misty Paint Stripper different from those imposed by the FHSA.

*12 [21] The precise allegations against Graphic Color, contained in count I of the plaintiff's amended complaint, are that it:

"a. Failed to warn R. Busch Drum, Inc. that the

inhalation of 'Misty Paint Stripper and Decal Remover' would cause the death of individuals using said product; b. Failed to properly instruct R. Busch Drum, Inc. in the use of the 'Misty Paint Stripper and Decal Remover.' "

In addition to arguing that these claims are preempted by the FHSA, Graphic Color argues that it owed no legal duty to warn Melissa of the dangers arising from use of the paint stripper or to instruct her as to its proper use because she was not a foreseeable user of the product. In support of this contention, Graphic Color cites to section 388 of the Restatement of Torts, which addresses the liability of persons supplying chattels for the use of others. In Huckabee v. Bell & Howell, Inc. (1970), 47 Ill.2d 153, 265 N.E.2d 134, this court, although not explicitly adopting section 388's provisions, cited to those provisions with approval. We find that this case is an appropriate one for application of section 388. For the reasons which follow, we hold that section 388 of the Restatement bars the plaintiff's action against Graphic Color.

Section 388 states:

"s 388. Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely

to be dangerous." (Emphasis added.) Restatement (Second) of Torts s 388 (1965).

The chattel at issue here is the Misty Paint Stripper which Graphic Color supplied to Busch Drum for use in cleaning its ink vats. Prior to Melissa's death, Richard was the only Busch Drum employee who had ever cleaned Graphic Color's vats. Melissa was never authorized by Richard or Carol Busch to perform that task. In an affidavit, Richard admitted that Melissa "was never an employee, agent or independent contractor of or for R. Busch Drum, Inc. * * * [and] was never paid any sums of money, whether by cash or negotiable instrument at any time whatsoever." He further admitted that he "at no time ever requested that * * * Melissa go to the premises of R. Busch Drum, Inc. for any reason on March 20, 1989 and * * * was totally unaware of her presence at the premises of R. Busch Drum, Inc. until such time as [he] arrived [there] * * * at approximately 12:20 p.m. * * *." Furthermore, in his answers to AMREP's interrogatories, Richard stated that he provided no warnings, instructions or training to Melissa regarding how to clean the ink vats or properly use the Misty Paint Stripper.

*13 Similarly, Carol Busch acknowledged in an affidavit that she and Richard were the only employees of Busch Drum, that Melissa was never employed or retained in any capacity by the company, and that she never requested or authorized Melissa to clean Graphic Color's vats.

The record shows that Graphic Color supplied Busch Drum, not Melissa, with the Misty Paint Stripper, and the Graphic Color representative instructed only Richard how to clean the ink vats using the paint stripper.

Applying the provisions of section 388 to the foregoing facts, we hold that Graphic Color cannot be subject to liability for Melissa's death. Under section 388, Graphic Color is only liable for injuries to those whom it "should

expect" to use the paint stripper supplied to Busch Drum "with the consent of" Busch Drum or to those whom Graphic Color "should expect * * * to be endangered by its probable use" when used "in the manner for which and by a person for whose use it is supplied." (Restatement (Second) of Torts s 388 (1965).) Clearly, Melissa falls into neither of these categories.

[22] Comment a to section 388 explains that:

> "The words 'those whom the supplier should expect to use the chattel' and the words 'a person for whose use it is supplied' include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person * * *. * * *
> In the cases thus far decided, the rule stated in this Section has been applied only in favor of those who are injured while the chattel is being used by the person to whom it is supplied, or with his consent." (Emphasis added.) Restatement (Second) of Torts s 388, Comment a, at 301 (1965).

[23] Further discussing the scope of liability under section 388, comment e explains that, "[e]xcept possibly where there is a privilege to use the chattel, the one who supplies a chattel for another's use is not subject to liability for bodily harm caused by its use by a third person without the consent of him for whose use it is supplied." (Emphasis added.) Restatement (Second) of Torts s 388, Comment e, at 303 (1965).

As Graphic Color points out, under the applicable provisions of section 388, the plaintiff must prove two things before Graphic Color can be subject to liability for Melissa's death. First, he must show that Melissa used the paint stripper supplied by Graphic Color with the consent of someone at Busch Drum. Second, he must show that Graphic Color should have expected that Melissa

would use the product. By virtue of the numerous admissions in the record indicating that Melissa was never authorized by anyone at Busch Drum to clean the ink vats or to use the paint stripper, Graphic Color cannot be subject to liability for her death. Apart from being Richard's wife, Melissa had no connection whatsoever with Busch Drum. At the time of her death, unbeknownst to Richard or Carol Busch, Melissa took it upon herself to enter Busch Drum's premises and undertake the task of cleaning Graphic Color's ink vats using the Misty Paint Stripper. Melissa had never cleaned the vats in the past, nor was she ever taught how to properly do so. Under these circumstances, Melissa clearly was not a member of a class whom Graphic Color should have expected would use the paint stripper. Accordingly, Graphic Color is not liable for her death. See Restatement (Second) of Torts s 388, Comment a, at 301 (1965).

*14 [24] Finally, we reject the plaintiff's assertion that Graphic Color is subject to liability for Melissa's death because she was "privileged" to use the paint stripper despite the lack of consent from Richard or Carol Busch. (See Restatement (Second) of Torts s 388, Comment e, at 303 (1965).) The plaintiff bases this "privilege" on the fact that Melissa was his wife and it is commonly understood that in a small, family-owned company, such as Busch Drum, family members will often help out around the company. Under such circumstances, the plaintiff argues, Melissa falls within the class of persons whom Graphic Color should have expected would use the paint stripper. The plaintiff has cited no authority to support this contention. In any event, this court cannot permit the unfairness that would result from such a holding particularly where Richard and Carol Busch both repeatedly admitted that Melissa was not authorized to clean the ink vats or to use the paint stripper which Graphic Color supplied to Busch Drum. For these

reasons, summary judgment was properly entered in favor of Graphic Color.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court, upholding the circuit court's grant of summary judgment in favor of AMREP and Graphic Color, is affirmed.

Judgment affirmed.

HARRISON, J., took no part in the consideration or decision of this case.

Justice MILLER, specially concurring:

I concur in the judgment of the court. I write separately because I believe that Federal legislation preempts the plaintiff's action in its entirety.

The majority holds that the provisions of the Federal Hazardous Substances Act (FHSA) (15 U.S.C. s 1261 et seq. (1988)) preempt the plaintiff's claim against defendant AMREP, Inc., manufacturer of Misty Paint Stripper and Decal Remover. The majority declines, however, to adopt that reasoning with respect to defendant Graphic Color, which supplied the product to the plaintiff. The majority instead concludes that Graphic Color owed no duty of care to the decedent because she was not a foreseeable user of the product. I believe that the plaintiff's claim against Graphic Color is similarly preempted by the FHSA and, like the trial judge and appellate court, would grant summary judgment to Graphic Color on that ground. Allowing the plaintiff to proceed with his common law action against Graphic Color would be inconsistent with the preemptive features of the Federal legislation.

The preemption provision of the FHSA states:

"[I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or

3(b) * * * designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) * * *." 15 U.S.C. s 1261 note (b)(1)(A) (1988).

*15 The gravamen of the plaintiff's claim against Graphic Color, like that of its claim against AMREP, is the defendant's failure to provide warnings of the dangers of Misty Paint Stripper and instructions regarding its proper use. Notably, the plaintiff does not contend that there is any basis for distinguishing between these two defendants. Nor does the plaintiff argue that Graphic Color made any special warranty or representation regarding the use of the paint stripper. Just as the plaintiff's claim against the product manufacturer is preempted by the Federal Hazardous Substances Act, so too must be the plaintiff's corresponding claim against Graphic Color.

Cases construing the similar preemption provision of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. s 136 et seq. (1988)) have held that a manufacturer may not be held liable for failing to provide point-of-sale or other warnings in addition to those that appear on the product label; the rationale for those decisions is that imposing such a requirement would improperly suggest that the label on the product itself was in same way deficient. (Taylor AG Industries v. Pure-Gro (9th Cir.1995), 54 F.3d 555, 561; Papas v. Upjohn Co. (11th Cir.1993), 985 F.2d 516, 519; Jenkins v. Amchem Products, Inc. (1994), 256 Kan. 602, 620-23, 886 P.2d 869, 881-82.) By the same token, in the absence of some special duty or warranty running between Graphic Color

and the plaintiff, requiring Color Graphics to provide separate warnings of the product's dangers would suggest that the manufacturer's own label was inadequate. (See Taylor AG Industries, 54 F.3d at 561 & n. 3.) To hold Graphic Color liable in these circumstances would be inconsistent with the preemptive goals of the Federal legislation. The majority correctly finds that the plaintiff's claim against AMREP is preempted by the FHSA, and I would extend the same reasoning to the plaintiff's claim against Graphic Color.

FN1. In their opinion concurring in the judgment in part and dissenting in part, Justices Scalia and Thomas agreed with the four-member plurality that the 1969 statute applied to State common law actions and served to preempt the petitioner's failure-to-warn claims. The justices went on to conclude, however, that Congress clearly intended the statute to preempt the petitioner's remaining tort claims as well, as evidenced by the statute's "text, structure, purposes and subject matter." Cipollone, 505 U.S. at 544-45, 112 S.Ct. at 2632, 120 L.Ed.2d at 441 (Scalia, J., concurring in part & dissenting in part, joined by Thomas, J.).

268 Ill.App.3d 763, 206 Ill.Dec. 71,
Prod.Liab.Rep. (CCH) P 14,143

Richard BUSCH, as Adm'r of the Estate of Melissa Busch,

Deceased, Plaintiff-Appellant,

v.

GRAPHIC COLOR CORPORATION et al., Defendants-Appellees.

No. 2-94-0141.
Appellate Court of Illinois,
Second District.

Jan. 5, 1995.
Rehearing Denied Jan. 31, 1995.

Presiding Justice McLAREN delivered the opinion of the court:

The plaintiff, Richard Busch, as administrator of the estate of his deceased wife, Melissa Busch, appeals the grant of summary judgment by the circuit court of Du Page County in favor of the defendants, Graphic Color Corporation and Amrep, Inc., based upon the court's determination that the plaintiff's State-law action for wrongful death was preempted by Federal law. We affirm.

Richard Busch owns R. Busch Drum, Inc., which buys, sells, and brokers recyclable industrial drums. Early in 1989, Graphic Color engaged Busch to clean some of its printing ink vats. Graphic Color provided Busch with 60 cans of Misty paint stripper and decal remover (Misty

paint stripper), which is manufactured by defendant Amrep. Graphic Color also provided Busch with 12 *841 [206 Ill.Dec. 73] vats to clean, each of which was about five feet high and five feet in diameter.

Graphic Color did not specifically warn Busch that Misty paint stripper, which contains methylene chloride, could be fatal if inhaled, but each can of the product contained printed warnings which track language required by the Federal Consumer Product Safety Commission (Safety Commission). See Safety Commission, Labeling of Certain Household Products Containing Methylene Chloride; Statement of Interpretation and Enforcement Policy (hereinafter 1987 Enforcement Policy), 52 Fed.Reg. 34,698-702 (1987).

Melissa Busch, although not an employee of R. Busch Drum, Inc., occasionally helped her husband with his business. On March 20, [268 Ill.App.3d 765] 1989, Richard Busch left his Cicero, Illinois, place of business to call on customers. When he returned he found Melissa unconscious next to one of the vats. She died, and the cause of death was determined to be methylene chloride intoxication.

On January 31, 1991, the plaintiff filed a complaint at law alleging wrongful death against the defendants based upon a claimed breach by the defendants of the duty to warn of the danger of methylene chloride. The plaintiff proffered an affidavit by Robert E. Davis, a chemist experienced in the properties of toxic chemicals, who expressed the opinion that the warning label contained on the Misty painter stripper cans was insufficient in that it does not specifically warn of the asphyxiation hazard of methylene chloride.

The defendants filed motions for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 1992)), alleging that the plaintiff's State-law action was preempted by the Federal Hazardous Substances Act (FHSA). (15 U.S.C. Sec. 1261 et seq. (1988).) Following a hearing on January 3, 1994, the circuit court granted summary judgment for both defendants, finding preemption. The plaintiff filed a timely appeal.

On appeal, the plaintiff argues that the circuit court erred in finding preemption in that (1) the Safety Commission did not comply with Federal law in promulgating warning label requirements for products containing methylene chloride, and (2) the warning required for such products concerns a risk of injury which is different from that suffered by Melissa Busch.

[1][2][3] We note initially that, because this matter comes to us via summary judgment, we have de novo review. (Olympic Restaurant Corp. v. Bank of Wheaton (1993), 251 Ill.App.3d 594, 598, 190 Ill.Dec. 874, 622 N.E.2d 904.) A motion for summary judgment is properly granted only when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (Purtill v. Hess (1986), 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867, quoting Ill.Rev.Stat.1983, ch. 110, par. 2-1005(c) (now 735 ILCS 5/2-1005(c) (West 1992)).) Supreme Court Rule 191(a) provides that facts asserted in support of or opposition to a motion for summary judgment must be contained in affidavits and "shall be made on the personal knowledge of the affiants." (134 Ill.2d R. 191(a).) Such affidavits must conform to the requirements of Supreme Court Rule

191. Giampa v. Sunbeam Corp. (1966), 68 Ill.App.2d 425, 430, 216 N.E.2d 233.

We first consider the plaintiff's argument that the Safety Commission's labeling requirements for methylene chloride products are null and void because the Safety Commission did not comply [268 Ill.App.3d 766] with the federally mandated procedures for establishing binding labeling requirements. Therefore, the plaintiff argues, the labeling requirements for methylene chloride do not in fact exist and can have no preemptive effect.

[4] The defendants counter that the plaintiff waived this argument for appeal because he did not raise the issue below. The parties agree that, as a general principle of law, issues not raised in the trial court are waived for purposes of appeal. Lannom v. Kosco (1993), 247 Ill.App.3d 629, 635-36, 186 Ill.Dec. 541, 616 N.E.2d 731.

[5] Here, the record discloses that the only mention of the plaintiff's contention that *842 [206 Ill.Dec. 74] the Safety Commission's labeling requirements for methylene chloride were void came in a brief colloquy during argument for summary judgment. Counsel for the plaintiff stated:

> "What was issued in 1987 [1987 Enforcement Policy] was merely an intention of bringing enforcement actions.
>
> They [Safety Commission] followed none of the rule-making procedures to get a valid rule under the Federal Hazardous Substance [sic] Act. They just said, 'If you don't do this, we're going to sue you. But if you beat us in court, you can win.' "

The plaintiff's counsel offered no affidavit in support of this contention, nor did he claim that he knew of his own knowledge or through some research that the Safety Commission in fact violated Federal rule-making procedures. Thus, the plaintiff did not satisfy the requirements of Supreme Court Rule 191. His comments were mere argument and did not raise a sufficient factual assertion to prevent the trial court from deciding the issue as a matter of law. The plaintiff has waived this issue for appeal.

The plaintiff cites Toepper v. Brookwood Country Club Road Association (1990), 204 Ill.App.3d 479, 149 Ill.Dec. 585, 561 N.E.2d 1281, as supporting his claim that he did not commit waiver. This case, however, is inapplicable here. In Toepper, we determined that the plaintiffs did not waive an argument for purposes of appeal when they first raised the issue during oral arguments on a motion for judgment on the pleadings. However, the plaintiffs in Toepper raised that same issue again during argument on a motion before the trial court to reconsider entry of judgment on the pleadings. Three years later, the plaintiffs incorporated that issue in their response to renewed motions for judgment on the pleadings. (Toepper, 204 Ill.App.3d at 490, 149 Ill.Dec. 585, 561 N.E.2d 1281.) Thus, the opponents in Toepper, and the trial court which considered the issue, clearly had ample opportunity to consider the merits of the argument.

[6] Further, the issue in Toepper was raised in a motion for judgment on the pleadings pursuant to section 2-615(e) of the Code. (735 ILCS 5/2-615(e) (West 1992).) The present matter was determined pursuant[268 Ill.App.3d 767] to a motion for summary judgment under section 2-1005. Supreme Court Rule 191, as we have noted, requires that factual assertions made pursuant to

summary judgment motions under section 2-1005 be contained in affidavits based on personal knowledge. Supreme Court Rule 191 does not apply to section 2-615(e) motions for judgment on the pleadings.

[7][8] Additionally, while we are bound to follow Federal case law which interprets Federal statutes (Templeton v. Chicago & North Western Transportation Co. (1991), 211 Ill.App.3d 489, 495, 155 Ill.Dec. 954, 570 N.E.2d 467), the plaintiff has cited no Federal cases or other authority which passes on the validity of the Safety Commission's labeling requirements for methylene chloride. We note that the defendants' counsel countered the plaintiff's contentions during the summary judgment hearing. Defendants' counsel contended that the Safety Commission's rules were valid because they complied with a summary procedure permitted under Federal law. This argument was not supported by a Rule 191 affidavit nor by citation to case law. However, in the absence of a clear statement in any Federal statute or case law that this particular regulation is void, we will assume that a facially valid regulation is binding.

We next consider the plaintiff's contention that his State-law cause of action is not preempted because his wife died from an ailment not covered by the warning label required by the Safety Commission for methylene chloride products. We first note the general principles of Federal preemption.

[9][10][11] The supremacy clause of the United States Constitution mandates that any State law which conflicts with Federal law is without effect. (Farner v. Brunswick Corp. (1992), 239 Ill.App.3d 885, 889, 180 Ill.Dec. 493, 607 N.E.2d 562.) Our preemption analysis begins with the assumption that the historic police powers of the State

are not to be superseded by Federal law unless that is "the clear and manifest purpose of Congress." (Farner, 239 Ill.App.3d at 889, 180 Ill.Dec. 493, 607 N.E.2d 562.) Thus, the *843 [206 Ill.Dec. 75] ultimate question in any preemption analysis is to determine the intent of Congress, which may be stated expressly in the statute's language or implied in the Federal law's structure and purpose. Farner, 239 Ill.App.3d at 889, 180 Ill.Dec. 493, 607 N.E.2d 562.

[268 Ill.App.3d 768] [12] Three circumstances give rise to preemption of State law by a Federal enactment. First, State law is preempted if the Federal statute at issue explicitly defines the extent of preemption intended. Second, Congress may demonstrate an intention to occupy a field of regulation with a scheme so comprehensive that there is no room for State supplementation. Third, State law is preempted to the extent that it actually conflicts with Federal law, thereby making compliance with both State and Federal regulations impossible. Brennan v. Wisconsin Central Ltd. (1992), 227 Ill.App.3d 1070, 1075-76, 169 Ill.Dec. 321, 591 N.E.2d 494.

The question of whether and to what extent Federal law preempts State law recently was revisited by the United States Supreme Court in Cipollone v. Liggett Group, Inc. (1992), 505 U.S. ----, 112 S.Ct. 2608, 120 L.Ed.2d 407. That case declared that a State-law claim for damages based on the failure to warn by cigarette manufacturers was preempted by Federal law to the extent that the claim relied on omissions or inclusions in advertisements or promotions. (Cipollone, 505 U.S. at ----, 112 S.Ct. at 2625, 120 L.Ed.2d at 431-32.) Such warnings, the Court determined, were preempted by federally mandated health warnings printed on each package of cigarettes.

The preemption section of the FHSA which is relevant here provides:

> "[I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk or illness or injury * * *." (Emphasis added.) 15 U.S.C. Sec. 1261 Note Sec. 18(b)(1)(A) (1982).

It is uncontested that products containing methylene chloride are subject to the cautionary labeling required by the FHSA. Thus, the sole substantive issue presented here is whether the warning contained on the can of Misty paint stripper is aimed at "the same risk of illness or injury" as that suffered by Melissa Busch.

Each can of Misty paint stripper carried the following warning on the front label:

"WARNING

VAPOR HARMFUL, CONTENTS

UNDER PRESSURE KEEP OUT

OF REACH OF CHILDREN. Read

other precautions on back panel."

The back panel of each can contained the following

statement:

"WARNING

Contains methylene chloride

which has been shown to cause

cancer in certain laboratory

animals. Risk to your health

depends on level and duration

of exposure."

The plaintiff contends that the Misty paint stripper label warns only of a risk of cancer, whereas Melissa Busch died of acute methylene[268 Ill.App.3d 769] chloride poisoning. The precise question we face here was answered by the Safety Commission in its report of final rules under the FHSA, published in the October 9, 1992, edition of the Federal Register:

> "Comment. An ancillary comment was made that the labeling requirements under the FHSA are too weak and vague to preempt state laws.
>
> Response. The requirements of the FHSA are not vague. * * * [T]he labeling must communicate to the consumer an understanding of the potential hazard or hazards presented by the product in order *844 [206 Ill.Dec. 76] to avoid being misbranded and subject to legal action.

* * * * * *

The cautionary labeling required under the FHSA must present a balanced perspective of the potential hazards of the product. Many products which may cause chronic health effects may also be acutely toxic and present physical hazards, such as flammability. The suggested labeling for methylene chloride paint strippers had to take into consideration the product's acute inhalation toxicity in addition to the carcinogenicity hazard. Therefore, the suggested front panel label statement is 'VAPOR HARMFUL' with the instruction 'Read Other Cautions and HEALTH HAZARD INFORMATION on back panel' and the back panel statement is 'Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals.' For products where the only hazard is carcinogenicity and the evidence of increased risk of cancer to humans is clear, the labeling would be more straight forward." (Emphasis added.) 57 Fed.Reg. 46,664 (1992) (to be codified at 16 C.F.R. pt. 1500 (1994)).

[13][14] Although we agree with the plaintiff that the warning label on the cans of Misty paint stripper focuses most specifically and directly on the cancer risk, there is no question that it tracks the language which the Safety Commission has determined to be an adequate warning for the exact danger experienced by Melissa Busch. As the Safety Commission's rules are, as we noted above, facially valid, they preempt State regulation in the area of warning labels for the danger of acute inhalation poisoning from methylene chloride. State regulation includes permitting the filing of tort actions which impact on the regulated area. (Farner, 239 Ill.App.3d at 891, 180 Ill.Dec. 493, 607 N.E.2d 562.) Thus, we conclude that Federal law preempts the plaintiff's State-law cause of action.

We find unpersuasive the plaintiff's citation to a Federal case which found no preemption by the FHSA of a Connecticut law regulating toys designed for children between the ages of three and seven. Toy Manufacturers of America, Inc. v. Blumenthal (2d Cir.1993), 986 F.2d 615.

[268 Ill.App.3d 770] In Toy Manufacturers, the Court of Appeals for the Second Circuit found that Congress specifically declined to enact legislation regulating toys for children in the age group governed by the Connecticut statute. The court noted that a subsection of the FHSA expressly states that the Federal regulation " 'does not apply to toys or other articles which are solely intended for use by children 3 years of age or older.' " (Emphasis omitted.) (Toy Manufacturers, 986 F.2d at 621, quoting 16 C.F.R. Sec. 1501.2(c) (1992).) Connecticut passed the law at issue in Toy Manufacturers specifically to fill in that gap by regulating toys for children under the age of three.

Quoting the precise preemption section from the FHSA that is applicable here (Toy Manufacturers, 986 F.2d at 618, citing 15 U.S.C. Sec. 1261 Note Sec. 18(b)(1)(A) (1982)), the court determined that, because the FHSA and the Connecticut statute were clearly aimed at different age groups, the Connecticut law did not address the same risk of illness or injury as governed by the FHSA. (Toy Manufacturers, 986 F.2d at 623.) Further, the court found no implied preemption, reasoning that there was a "reliable indicium of congressional intent with respect to state authority." (Emphasis omitted.) (Toy Manufacturers, 986 F.2d at 624.) Here, the plain language of the Safety Commission's published rules and commentary clearly indicates preemption.

Although no Illinois cases have passed on the

preemptive effect of the FHSA, we find support for our holding in an analogous case in which this court found preemption under similar circumstances. Farner v. Brunswick Corp. (1992), 239 Ill.App.3d 885, 180 Ill.Dec. 493, 607 N.E.2d 562.

In Farner, we determined that a State-law products liability complaint against the manufacturer of a boat motor was preempted by the Federal Boat Safety Act of 1971 (Boat Act) (46 U.S.C. Sec. 4301 et seq. (1988)). (Farner, 239 Ill.App.3d at 892, 180 Ill.Dec. 493, 607 N.E.2d 562.) The plaintiff in Farner was injured when she was struck by a boat propeller *845. [206 Ill.Dec. 77] which had no blade guard. We concluded that a preemption provision within the Boat Act precluded a State cause of action despite the existence within the Boat Act of a so-called "savings clause," which provided:

> "Compliance with this chapter [46 U.S.C. Sec. 4301 et seq.] or standards, regulations, or orders prescribed under this chapter [46 U.S.C. Sec. 4301 et seq.] does not relieve a person from liability at common law or under State law." Farner, 239 Ill.App.3d at 890, 180 Ill.Dec. 493, 607 N.E.2d 562.

Nonetheless, we found preemption based on a section of the Boat Act which, in language similar to that in the present matter, prohibited a State from establishing or enforcing laws or regulations governing recreational vessel equipment safety standards. (Farner, 239 Ill.App.3d at 891-92, 180 Ill.Dec. 493, 607 N.E.2d 562.) We believe that the preemption section of the FHSA similarly expresses a clear statement by Congress that States may not establish guidelines, nor by extension entertain tort [268 Ill.App.3d 771] actions arising out of them, for labels which address the danger of acute

inhalation poisoning from methylene chloride.

The judgment of the circuit court of Du Page County is affirmed.

Affirmed.

GEIGER and BOWMAN, JJ., concur.

UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF DUPAGE
IN THE CIRCUIT COURT FOR THE
EIGHTEENTH JUDICIAL CIRCUIT,

RICHARD BUSCH, As Special Administrator of the Estate of of MELISSA BUSCH, deceased, Plaintiff,	)	
vs.	)	No. 91 L 207
GRAPHIC COLOR CORPORATION and AMREP, INC., Defendants.	)	

ORDER

THIS CAUSE COMING ON TO BE HEARD upon the Motions for Summary Judgment of AMREP, INC. and GRAPHIC COLOR CORPORATION, the Court having considered the written and oral arguments of the parties

IT IS HEREBY ORDERED:

1) The Motion for Summary Judgment of AMREP, INC. is granted and judgment is entered in favor of AMREP, INC. and against the Plaintiff.
2) The Motion for Summary Judgment of GRAPHIC COLOR CORPORATION is granted and judgment is entered in favor of GRAPHIC COLOR CORPORATION and against the Plaintiff.

Name: Wylie Mulherin, et al.
DuPage Attorney No. 92700
Attorney for Graphic Color
Address: 416 E. Roosevelt
City: Wheaton, IL 60187
Phone: (708) 643-9300

ENTER:

(Richard A. Lucas)
Judge
Date: January 3, 1994

(THE COURT:)

on recreational vehicles.

It's clear here that this label satisfies the label that the bureaucrats in Washington determined should be found on what they determined was a hazardous substance.

MR. SCHROEDER: May I have a brief response to my invention?

THE COURT: Really brief.

MR. SCHROEDER: We're found by the terms of what's written in the statute and what's written in their rule that they're trying to rely on. It says that the proposal was prompted by a concern that methylene chloride might pose a carcinogenic risk to humans. That was raised by tests showing that inhalation of methylene chloride vapor increased the incidence of various types of benign and malignant tumors in rats and mice.

MS. MC CULLOUGH: He says the proposal is prompted, and then later they explain what it was designed to cover.

THE COURT: I'll grant the motion for summary judgment. I believe this is beyond any doubt

preempted by the Federal Hazardous Substance Act. I've reviewed in great detail your response, and I may as a nonjudge agree with some of your thoughts on the matter, Carl. But it's the law of the land. You can rap bureaucrats till the inth degree.

A great human tragedy occurred in this case. Maybe I'm on a roll with summary judgments lately involving fatalities, and it brings a tear to your eye. It truly does. But we've got to follow the law. And I think, the law is, in my opinion, unquestionably clear. I think you're preempted out of this court. I grant the motion for summary judgment.

MR. VARCHETTO: I have adopted the argument on behalf of Graphic Color as well, Your Honor.

THE COURT: Same ruling.

MR. SCHROEDER: Can I argue on that, Judge?

THE COURT: Sure.

MR. SCHROEDER: It's going to be a different issue.

THE COURT: There appears to be overlapping from what I can see.

MR. SCHROEDER: Well, with the exception that the

The Federal Hazardous Substances Act

(15 U.S.C. 1261 ff.)

§ 1261. Definitions

For the purposes of this chapter--

•••

(d) The term "Commission" means the Consumer Product Safety Commission.

•••

(f) The term "hazardous substance" means:

(1)(A) Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(B) Any substances which the Commission by regulation finds, pursuant to the provisions of section 1262(a) of this title, meet the requirements of subparagraph (1)(A) of this paragraph.

•••

(p) The term "misbranded hazardous substance" means a hazardous substance . . . if the packaging or labeling of

such substance is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title or if such substance, except as otherwise provided by or pursuant to section 1262 of this title, fails to bear a label--

(1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children

from the hazard, and

(2) on which any statements required under subparagraph (1) of this paragraph are located prominently and are in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label.

•••

Note, effect upon Federal and State Law

Pub.L. 86-613, § 18, formerly 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, § 4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, § 4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, § 17(a), May 11, 1976, 90 Stat. 510, provided that:

(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title].

§ 1262. Declaration of hazardous substances

(a) Declaration of hazardous substances by regulation; review

(1) Whenever in the judgment of the Commission such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the Commission may by regulation declare to be a hazardous substance, for the purposes of this chapter, any substance or mixture of substances which it finds meets the requirements of subparagraph (1)(A) of section 1261(f) of this title.

(2) Proceedings for the issuance, amendment, or repeal of regulations under this subsection and the admissibility of the record of such proceedings in other proceedings, shall in all respects be governed by the provisions of section 371(e), (f), and (g) of Title 21, except that--

(A) the Commission's order after public hearing (acting upon objections filed to an order made prior to hearing) shall be subject to the requirements of section 348(f)(2) of Title 21; and

(B) the scope of judicial review of such order shall be in accordance with the fourth sentence of paragraph (2), and with the provisions of paragraph (3) of section 348(g) of Title 21.

(b) Reasonable variations or additional label requirements

If the Commission finds that the requirements of section 1261(p)(1) of this title are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, it may by regulation establish such reasonable variations or additional label requirements as it finds necessary for the protection of the public health and safety; and any such hazardous substance intended, or packaged in a form suitable, for use in the household or by

children, which fails to bear a label in accordance with such regulations shall be deemed to be a misbranded hazardous substance.

52 FR 34698-02

NOTICES

CONSUMER PRODUCT SAFETY COMMISSION

Labeling of Certain Household Products Containing Methylene Chloride; Statement of Interpretation and Enforcement Policy

Monday, September 14, 1987

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of interpretation and enforcement policy.

SUMMARY: The Commission [FN1] is issuing an interpretation and a statement of enforcement policy for household products that contain methylene chloride and that expose consumers to significant amounts of methylene chloride vapor. The Commission considers such products to be hazardous substances, under the provisions of the Federal Hazardous Substances Act, basing its determination on animal test results that indicate such products may pose a carcinogenic risk to humans. Accordingly, if such products are not labeled properly, they are misbranded hazardous substances. This action by the Commission results from concerns raised by tests showing that inhalation of methylene chloride vapor can cause an increased incidence of benign mammary tumors in male and female rats and can cause an increased incidence of carcinomas and adenomas in male and female mice. The evidence currently available to the Commission shows that products in a number of classes present sufficient exposure of consumers to methylene chloride vapor that they should be considered

to be hazardous substances. These product classes are named in the following enforcement policy. Additional information may become available in the future showing that additional products are also hazardous substances. Once the enforcement policy becomes effective, the Commission intends to bring individual enforcement actions against products that are not properly labeled (or against the products' manufacturers, distributors, or importers). Such actions will provide full opportunities for the Commission's technical data and legal conclusions to be contested. In addition, such enforcement actions will be preceded by opportunities for industry members and Commission staff to discuss the applicability of the enforcement policy to particular products containing methylene chloride.

SUPPLEMENTARY INFORMATION:

A. Background

Previous Commission Action

On August 20, 1986, the Commission published a proposed rule that would declare household products containing other than contaminant levels of methylene chloride to be hazardous substances. 51 FR 29778. The proposal was prompted by a concern that methylene chloride might pose a carcinogenic risk to humans that was raised by tests showing that inhalation of methylene chloride vapor increased the incidence of various types of benign and malignant tumors in rats and mice.

•••

B. Determination of Hazardous Substance

After considering the comments on the proposed rule described above, the Commission has concluded that the animal test data showing increases in the incidence of various types of benign and malignant tumors in rats and

mice are sufficient to warrant a concern that methylene chloride may pose a carcinogenic risk to humans and that products containing it should be considered hazardous substances.

•••

Rather than continue with the rulemaking, the Commission believes it is preferable to issue this statement of interpretation and enforcement policy. If the rulemaking proceeding were continued, there is a potential that there would be a subsequent adjudicatory hearing, as well as subsequent appeals to the Commission and to a court of appeals, which could delay the effective date of the rule for up to several years.

•••

As discussed below, the Commission intends to allow a sufficient time for manufacturers to adopt revised labels without unnecessary costs involved in overlabeling products or discarding previously printed labels. After that time, the Commission intends to bring individual enforcement actions against improperly labeled products, or against the manufacturers, distributors, or retailers of such products. In such enforcement actions, the defendants will have full opportunity to contest the toxicity of methylene chloride, the exposure to consumers presented by the particular product, or any other technical or legal principle relied on by the Commission.

The publication of this notice expresses the Commission's view that the issues raised in the proposed rule can be best dealt with by issuing this statement of interpretation and enforcement policy; however, it is not intended to withdraw the proposed rule. Therefore, if it appears in the future that voluntary compliance with the Commission's interpretation, supported by enforcement actions against noncomplying firms, is inadequate to

obtain uniform compliance with the FHSA, the Commission will have the option of resuming the rulemaking proceeding.

•••

D. Required Labeling

General FHSA Labeling Requirements

Since the Commission has determined that household products which can expose consumers to methylene chloride vapor are hazardous substances because they may pose a carcinogenic risk to humans, such products will be required to bear labeling that meets the requirements of section 2(p)(1) of the FHSA.

•••

Labeling for Potential Cancer Hazards

•••

3. Detailed Example of Labeling for Paint Strippers

The Steering Committee for Methylene Chloride, a group of industry and consumer interest representatives working with the Commission's staff, previously considered the question of labeling language that will adequately convey to users the information needed to enable users to protect themselves and that will also comply with the requirements of the FHSA. The Steering Committee recommended the following labeling for products, such as some paint strippers, that contain high percentages of methylene chloride. The Commission believes that this labeling meets, and in certain respects exceeds, the minimum requirements of section 2(p)(1) of the FHSA.

[Front Panel]

CAUTION: Vapor Harmful, Read Other Cautions and HEALTH HAZARD INFORMATION on Back Panel

[or equivalent language]

[Back Panel]

Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals. Risk to your health depends on level and duration of exposure.

[Or equivalent language]

[The back panel labeling given above would be placed separately from use precaution information such as the following.]

Use this product outdoors, if possible. If you must use it indoors, open all windows and doors or use other means to ensure fresh air movement during application and drying. If properly used, a respirator may offer additional protection.* Obtain professional advice before using.* A dust mask does not provide protection against vapors.* Do not use in basement or other unventilated area.

FN*The use of respirators may not be a practical way for most consumers to protect themselves from methylene chloride vapors. Accordingly, the Commission should point out that the statement concerning respirators in the above labeling example that was recommended by the Steering Committee on Methylene Chloride is not required by the FHSA.

Open container carefully and close after each use. Clean up rags, papers, and waste promptly. Allow solvent to evaporate, then dispose of in metal containers.

[Or equivalent language suitable for the particular product involved.]

A label such as that stated above would be required by the potential carcinogenic inhalation hazard from paint strippers, although some of the precautions stated also may serve to protect against acute hazards that might be presented. Of course, the product's labeling would also have to meet the other requirements of the FHSA and to

address other hazards that the product may present. For example, the label may have to address the acute toxicity of methylene chloride, flammability hazards associated with a product, toxic gases that can be produced by contact with flame or hot surfaces, or the need to avoid contact with skin or eyes because of irritant or corrosive qualities in a product. Also, the label would have to include, when necessary or appropriate, instructions for first aid treatment, including instructions on actions to take if overcome by vapors.

Also, the particular precautions about actions to be taken or avoided that are given in the above example are intended primarily for paint removers, and these precautions may not apply to other products containing methylene chloride. For example, some products may not involve rags or other items that need to be disposed of separately.

E. Effect on State and Local Laws

Section 18(b)(1)(A) of the FHSA, 15 U.S.C. 1261n, provides:

(b)(1)(A) Except as provided in paragraphs (2) and (3) [15 U.S.C. 1261n], if hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. 1261(p), 1262(b)] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).

Under the Commission's interpretation, products that contain methylene chloride and that expose consumers to significant amounts of methylene chloride vapor are

hazardous substances subject to the requirements of section 2(p)(1) of the FHSA. Therefore, under the terms of section 18(b)(1)(A) of the FHSA, the Commission concludes that any statutes or regulations of state or local governments establishing cautionary labeling requirements designed to protect against the risk are void and unenforceable to the extent that the state or local requirements are not identical to the requirements under section 2(p)(1) of the FHSA.

• • •

H. Conclusion

For the reasons explained above, the Commission believes that household products that present a significant exposure to methylene chloride vapor are hazardous substances due to a potential hazard of human carcinogenicity. Labeling required by the FHSA will be enforced in accordance with the policy explained above. This policy is not a binding rule, but is merely a notice of the Commission's intention to bring appropriate enforcement actions under the FHSA. In any such actions, any parties who disagree about whether particular products containing methylene chloride are hazardous substances will have the opportunity to challenge the Commission's technical data and legal conclusions in federal district court.

Because this enforcement policy is not a proposed or final rule, the Regulatory Flexibility Act is inapplicable. Further, neither the publication of this notice nor the bringing of enforcement cases under the policy has any significant potential for affecting the environment, and no environmental assessment or environmental impact statement is required.

Dated: September 9, 1987.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 87-21094 Filed 9-11-87; 8:45 am]

Supreme Court, U.S.
FILED
JUN. 5 1996
CLERK

(2)

No. 95-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

Petitioner,

v.

AMREP, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF AMREP, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Hazardous Substances Act ("FHSA") preempt a state common law cause of action that alleges a label is defective because it lacks additional warnings when the Consumer Product Safety Commission, the agency charged with administering the FHSA, has determined that the label "meets, and in certain respects exceeds" the labeling requirements in Section 1261(p) of the FHSA?

PARTIES

The following were parties to the proceeding in the Illinois Supreme Court:

Petitioner/Plaintiff	Richard Busch
Respondent/Defendant	AMREP, Inc.
Defendant	Graphic Color Corporation

In accordance with this Court's Rule 29.6, AMREP, Inc. discloses that its parent company is Dawn Chemical, Inc. AMREP has no nonwholly owned subsidiaries.

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No. 95-1805

IN THE

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RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

Petitioner,

v.

AMREP, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF AMREP, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AMREP, Inc. ("AMREP") opposes the petition for certiorari to the Supreme Court of the State of Illinois filed by petitioner Richard Busch.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Supreme Court of Illinois, dated February 15, 1996 is reported at 169 Ill.2d 325, 662 N.E.2d 397, *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 6, 1996) (No. 95-1805). The Opinion of the

Appellate Court of Illinois, Second District, dated January 5, 1995 is reported at 268 Ill.App.3d 763, 644 N.E.2d 839, *reh'g denied*, January 31, 1995, *petition for leave to appeal granted* 162 Ill.2d 564, 652 N.E.2d 339 (1995).[1] The Order of the Circuit Court of DuPage County, Illinois and a portion of that court's ruling on January 3, 1994, are included in petitioner's Appendix at A-42-44.

STATUTES AND REGULATIONS INVOLVED

The Federal Hazardous Substances Act (the "FHSA"), 15 U.S.C. §1261(d), (f)(1)(A)-(B), (g), (n), (p), and §1261 Notes (b)(1)(A)-(B) (1976 U.S.C.C.A.N. 90 Stat. 503, 510-11); §1262(a)(1)-(2), and (g)(2). Consumer Product Safety Commission, Part 1031—Commission Participation And Commission Employee Involvement In Voluntary Standards Activities, 16 CFR §1031 (1995). AMREP's Appendix contains the relevant provisions not found in petitioner's Appendix.[2]

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions Below

On September 14, 1987, the Consumer Product Safety Commission (the "CPSC"), the agency charged with administering the FHSA, published its determination

[1] Petitioner's Appendix includes the Illinois Supreme Court's slip opinion at A-1 and the Product Liability Reporter publication of the Appellate Court's opinion at A-29. For the Court's convenience, AMREP will cite to the opinions found in petitioner's Appendix.

[2] AMREP will cite to petitioner's Appendix as "Pet.App." and to its own Appendix as "Resp.App."

that household products containing methylene chloride are hazardous substances and it issued notice of its enforcement policy ordering that these products bear labeling that meets the requirements of Section 1261(p) of the FHSA. Notices Consumer Product Safety Commission Labeling Of Certain Household Products Containing Methylene Chloride; Statement Of Interpretation And Enforcement Policy, 52 Fed.Reg. 34698-703 (1987) (Pet. App. at A-50). In addition, the CPSC determined that the labeling language for methylene chloride paint strippers recommended by a group of industry and consumer interest representatives working with the CPSC's staff "meets, and in certain respects exceeds, the minimum requirements of section 2(p)(1) of the FHSA". *Id.* The CPSC's enforcement policy began requiring this label in 1988. *Id.*

Respondent AMREP is the manufacturer of Misty Paint Stripper and Decal Remover ("Misty"), a paint stripper containing methylene chloride. On March 20, 1989, petitioner's wife, Melissa Busch, allegedly died as a result of "methylene chloride intoxication" (R. C-345).[3] Petitioner's Amended Complaint alleges a common law failure to warn cause of action against AMREP based entirely on alleged defects in Misty's label (R. C-11-13). It is undisputed that Misty's label contains the requisite language that the CPSC determined satisfies the requirements of Section 1261(p)(1) of the FHSA and which the CPSC announced it will enforce against manufacturers such as AMREP (Petition at 7; R. C-461-62; R. C-328-30).

[3] Citations to the trial court record are referenced as "R.C.-__".

AMREP filed a motion for summary judgment on the grounds that the FHSA preempts petitioner's cause of action. In response, petitioner expressly admitted the preemptiveness of both the FHSA and the CPSC's 1987 Statement of Interpretation and Enforcement Policy, but he argued that because the CPSC's recommended label was only designed to warn of the risk of cancer, his cause of action for failure to warn of a different risk was not preempted (R. C-288; C-294; C-300-31; C-333-69; C-372-431; C-433-52; C-453-514; C-533-34). Thus, in the trial court, petitioner wrote:

> Admittedly the Consumer Product Safety Commission has identified methylene chloride as a hazardous substance and has prescribed a certain warning for it. The notice requiring this label is cited in Defendant's motion . . . .
>
> * * *
>
> Under the F.H.S.A. the only preemption provided for is where the Consumer Product Safety Commission has identified a particular hazard and has provided a warning for that hazard. *When this occurs the states are preempted only from regulating warnings concerning the particular hazard identified by the Consumer Products Safety Commission.*

(R. C-384, C-389, emphasis added). Similarly, petitioner argued to the trial court,

> ***[T]he rule that [the CPSC] issued or the intention of enforcement that they issued *** indicates such products may pose a carcinogenic risk to humans. That was the only risk of injury they were concerned with, and it's the only risk of injury that label was issued under. Because of that, that's the only risk that's preempted. *** this is the real position of the defense in this case.

(R. C-533-34). In short, the only question petitioner raised in the trial court was whether or not the CPSC label on AMREP's product was designed to warn of the risk of inhalation toxicity. The trial court rejected petitioner's contention that it was not and held that the FHSA preempts plaintiff's common law failure to warn cause of action against AMREP (Pet.App. at A-42-44).

On appeal to the Illinois Appellate Court, petitioner contended for the first time that the FHSA does not preempt his cause of action because the CPSC failed to follow proper FHSA rule-making procedures when it identified methylene chloride as a hazardous substance and mandated cautionary labeling for methylene chloride paint strippers (Pet.App. at A-31). Alternatively, petitioner repeated his trial court defense that the FHSA does not preempt his cause of action because the CPSC label was not designed to warn of the risk of inhalation toxicity (Pet.App. at A-31). Thus, although petitioner admitted in the trial court that AMREP's compliance with the FHSA by adopting the CPSC label would preempt a cause of action for failure to warn of the risk of cancer, he reversed himself on appeal and argued that AMREP's use of the CPSC label would not trigger the FHSA's preemption of any failure to warn cause of action.

The Illinois Appellate Court unanimously rejected petitioner's attempt to re-invent his case on appeal and affirmed the trial court. In an opinion by Presiding Justice McLaren, the Appellate Court held that the petitioner waived for appeal the questions of whether the CPSC properly declared methylene chloride a hazardous substance and properly promulgated a label for methylene chloride paint strippers because petitioner failed to preserve these issues in the trial court (Pet.App. at 32-34). In addition, the Appellate Court held that

> there is no question that [Misty's label] tracks the language which the Safety Commission has determined to be an adequate warning for the exact danger experienced by Melissa Busch. As the Safety Commission's rules are, as we noted above, facially valid, they preempt State regulation in the area of warning labels for the danger of acute inhalation poisoning from methylene chloride.

(Pet.App. at 38).

On appeal to the Illinois Supreme Court, petitioner's opening brief only argued that the Appellate Court erred when it held that the FHSA preempts his cause of action. Significantly, petitioner did not argue that the Appellate Court erred when it found he had waived on appeal the issue of whether AMREP's use of the CPSC label lacks preemptive effect because the label was improperly promulgated. AMREP, on the other hand, argued that the Appellate Court's decision should be affirmed for two reasons. First, petitioner had waived the issue of whether AMREP's use of the CPSC-mandated label could trigger FHSA preemption because he failed to preserve this issue in the trial court and because he had waived the issue of whether the Appellate Court's finding of waiver was error by failing to make that argument in his opening brief.[4] Second, the Appellate Court properly determined that the FHSA preempts petitioner's cause of action because petitioner seeks to impose labeling language that differs from the language the CPSC determined "meets, and in certain respect exceeds" the labeling requirements of Section 1261(p) of the FHSA.

[4] Illinois Supreme Court Rule 341(e)(7) expressly provides that "[p]oints not argued" in an appellant's brief "shall not be raised in the reply brief, in oral argument, or on petition for rehearing". 134 Ill.2d R. 341(e)(7) (1990).

In a unanimous and well-reasoned opinion by Chief Justice Bilandic, the Illinois Supreme Court affirmed the Appellate Court's finding that the FHSA preempts petitioner's cause of action. Specifically, the Illinois Supreme Court held:

- "Congress intended to preempt all nonidentical State laws proposing cautionary labeling requirements addressing the same risk of illness or injury as the FHSA" (Pet.App. at A-10);
- The provisions of Section 1261(p) of the FHSA are "requirements for the cautionary labeling of hazardous substances . . . . Indeed, Congress made this fact clear by referring to the provisions of section 1261(p) as cautionary labeling 'requirements' in the language of the FHSA's preemption provision" (Pet.App. at A-15);
- The CPSC's detailed labeling for methylene chloride paint strippers represents the CPSC's interpretation of the statute it is charged with administering and it is proper to defer to the CPSC's conclusion that this label satisfies the cautionary labeling requirements of Section 1261(p) of the FHSA because Congress has yet to express its view on the issue and because the CPSC's interpretation of the FHSA is reasonable (Pet.App. at A-17-18);[5]

[5] Like the Illinois Supreme Court, this Court has repeatedly held that, under the "Chevron doctrine", when an agency is entrusted with the responsibility to administer legislation, its interpretation of the meaning of that legislation is entitled to substantial deference by the courts. *E.g.*, *Babbitt v. Sweet*

(continued...)

- Misty's label is "virtually identical" to the CPSC label for methylene chloride paint strippers. Therefore, the additional warnings petitioner seeks to impose under Illinois common law constitute requirements that are not identical to those required under the FHSA (Pet.App. at A-18); and
- "[T]he cautionary labeling requirements of the FHSA for paint strippers containing methylene chloride are intended to protect against the same risk at issue here, namely, the risk of acute inhalation toxicity" (Pet.App. at A-20).

The Illinois Supreme Court did not, however, decide the state law questions of waiver. It neither affirmed nor reversed the Appellate Court's finding of waiver, nor did it resolve the question of whether petitioner waived his right to challenge that Appellate Court finding when he failed to argue it was error in his opening brief (Pet. App. at A-1-28).

B. Corrections of Misstatements in the Petition for Certiorari

Pursuant to United States Supreme Court Rule 15.2, AMREP brings to the Court's attention the following misstatements of law contained in the petition for certiorari:

1. First, the petition erroneously states that in order for the CPSC to declare a product hazardous, the CPSC must issue a regulation pursuant to Section 1262(a)(2) of the FHSA, which incorporates the regulatory scheme in the Food Drug and Cosmetic Act (Petition at 10). This is a misstatement of the law. Under Sections 1261(f)(1)(A)-(B) and 1262(a)(1) of the FHSA, a substance can be determined to be hazardous without a regulation declaring it hazardous.[6] Section 1262(a)(2) only applies if the CPSC elects to proceed by regulation to declare a substance hazardous.

2. Second, the petition erroneously states that in order for the CPSC to properly promulgate a specific label for a product, the CPSC must issue a regulation pursuant to

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[5] (...continued)
Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407, 2416 and 2418 (1995); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). In *Sweet Home*, this Court recently and firmly emphasized the Chevron doctrine when it deferred to the interpretation of a statute by an agency which had been "delegated broad administrative and interpretive power." 115 S.Ct. at 2418.

[6] As a court recently interpreted Section 1262(a):

> [T]he language of section 1262(a), which gives the Commission discretionary power to promulgate regulations to avoid uncertainty, was tracked in section 3 of the original act. *** With regard to [current section 1262(a)], the House Report states: 'The failure to issue such a declaratory regulation will, of course, not have the effect of excluding from the basic definition of the term "hazardous substance" any substance otherwise within it.'

X-TRA Art, Inc. v. Consumer Product Safety Comm'n, 1991 U.S. Dist. LEXIS 8290 (N.D.Cal. June 11, 1991). Likewise, the CPSC interprets Section 1262(a)(1) to allow that agency to declare a substance hazardous without enacting a regulation. Procedures For Formal Evidentiary Public Hearing, 55 Fed.Reg. 48628 (1990) ("For a substance to be considered a hazardous substance under [15 U.S.C. §1262(a)(1)] it is not necessary for the [CPSC] to act by regulation to declare it a hazardous substance").

Section 1262(a)(2) of the FHSA, which incorporates the regulatory scheme in the Food Drug and Cosmetic Act (Petition at 10 and 15). This too is a misstatement of law. In 1981, Congress amended the FHSA to expressly require the CPSC to rely on voluntary labeling standards rather than promulgating mandatory labeling standards when a voluntary standard will eliminate or adequately reduce the risk of injury and it is likely there will be substantial compliance with the voluntary labeling standard. 15 U.S.C. §1262(g)(2) (Resp.App. at 2a-3a). Indeed, Section 1262(g)(2) expressly states that the CPSC can terminate any proceeding to declare a substance a "banned hazardous substance" and can elect instead to rely on a voluntary labeling standard (Resp.App. at 2a-3a). As the result of Congress' inclusion of Section 1262(g)(2) in the FHSA, the CPSC enacted specific regulations establishing guidelines under which that agency is required to rely on voluntary standards, such as the label at issue in this case. Commission Participation And Commission Employee Involvement In Voluntary Standards Activities, 16 CFR §1031 (1995) (Resp.App. at 3a-4a).[7] Thus,

---

[7] The CPSC's regulations provide in part that:

> The [CPSC] may find that a mandatory standard is not necessary where compliance with an existing voluntary standard would eliminate or adequately reduce the risk of injury associated with the product, contains requirements and test methods that have been evaluated and found acceptable by the [CPSC], and it is likely that there will be substantial and timely compliance with the voluntary standard. Under such circumstances, the [CPSC] may agree to encourage industry compliance with the voluntary standard and subsequently evaluate the effectiveness of the

(continued...)

petitioner's citation to *Pactra Industries, Inc. v. Consumer Product Safety Comm'n*, 555 F.2d 677 (9th Cir. 1977) and *Springs Mills, Inc. v. Consumer Product Safety Comm'n*, 434 F. Supp. 416 (D.S.C. 1977) (Petition at 11), as support for his contention also misstates the law because these cases were decided before Section 1262(g)(2), requiring the CPSC to rely on voluntary labeling standards, was added to the FHSA.

3. Third, the petition erroneously states that in order for the FHSA to preempt state law, the CPSC must enact a regulation (Petition at 10). Petitioner misstates the law because the FHSA contains two preemption provisions. The first provision, the "labeling" preemption provision that petitioner admits applies in this case, does not require a regulation, but instead provides for preemption by a "cautionary labeling requirement under section [1261](p)" of the FHSA. 15 U.S.C. §1261 note (b)(1)(A) (Petition at 6; Pet.App. at A-47). Only the second FHSA preemption provision, the "banned hazardous substances" provision that is not at issue here, provides for preemption by a "requirement" promulgated "under regulations". 15 U.S.C. §1261 note (b)(1)(B) (Resp.App. at 1a-2a). Thus, when Congress meant that only a regulation could preempt, it drafted a preemption provision that uses the word "regulation", but when it meant that something other than a "regulation" could preempt, Congress drafted the "labeling" preemption provision at issue here that does not use the word "regu-

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[7] (...continued)

> standard in terms of accident and injury reduction for products produced in compliance with the standard.

16 CFR §1031.4(a)(2) (Resp.App. at 3a-4a).

lation". Accordingly, petitioner's citation to *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1993), as support for his position also misstates the law because that decision interprets and applies the "banned hazardous substances" preemption provision (note (b)(1)(B)), which petitioner concedes does not apply in this case.

4. Finally, the petition misstates that the Illinois Supreme Court held that the CPSC label for methylene chloride paint strippers is a federal law that preempts petitioner's cause of action (Petition at 9-10). In truth, the Illinois Supreme Court held that Section 1261(p) of the FHSA is the federal law that preempts petitioner's cause of action (Pet.App. at A-15). According to the Illinois Supreme Court, the CPSC label on AMREP's product is "an interpretation" of the FHSA by the agency charged with administering the Act that this particular label "satisfies the cautionary labeling requirements of Section 1261(p)(1)" (Pet.App. at A-17-18).

REASONS FOR DENYING THE WRIT

Petitioner argues that his writ should be granted for these reasons: (a) the Illinois Supreme Court wrongly determined that the FHSA preempts his cause of action; (b) the Illinois Supreme Court's decision conflicts with the Ohio Supreme Court's decision in *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994); and (c) the Illinois Supreme Court's decision conflicts with this Court's holdings in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995), and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (Petition at 6-15). All of petitioner's arguments rest entirely on his self-serving misreading of these authorities and, for the reasons below, petitioner's writ should be denied.

A. The Illinois Supreme Court Properly Held That The FHSA Preempts Petitioner's Cause Of Action Because Petitioner Seeks To Impose Labeling Requirements That Are Not Identical To The FHSA's Labeling Requirements For Methylene Chloride Paint Strippers.

Petitioner's contention that the Illinois Supreme Court misapplied the FHSA is based on petitioner's false assertion that the labeling requirements in Section 1261(p) of the FHSA are insufficient to preempt his cause of action because they are identical to the labeling he seeks to impose under Illinois law (Petition at 9). Petitioner's argument conveniently ignores the fact that the CPSC has determined that the label on AMREP's product "meets, and in certain respects exceeds, the minimum requirements" of Section 1261(p)(1) of the FHSA (Pet. App. at A-53-54). Thus, the Illinois Supreme Court correctly held that:

> The labeling requirements which the plaintiff seeks to impose on AMREP, namely, a warning that inhalation of Misty Paint Stripper 'would cause death' and 'adequate instructions for its use' (implying that the existing instructions are not adequate), constitute requirements that are not 'identical' to those required under section 1261(p)(1). (See 15 U.S.C. s 1261 note (b)(1)(A) 1988). As the Safety Commission's interpretation of section 1261(p)(1) reveals, the additional information which the plaintiff seeks to require AMREP to place on the label is not mandated by the FHSA. Accordingly, the plaintiff's tort claims

> against AMREP, based on a failure to warn, are preempted.

(Pet.App. at A-18). In short, the Illinois Supreme Court's purported "misapplication" of the FHSA is simply a product of petitioner's invention. Moreover, as this Court's own Rule 10 provides, misapplication of a properly stated rule of law is not a basis for granting a writ of certiorari except in rare instances. The Illinois Supreme Court's decision does not meet this prerequisite as evidenced by this Court's previous refusal to review a similar decision in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir.) *cert. denied*, 113 S.Ct. 2999 (1993) (the FHSA preempts state tort claims that seek to impose labeling requirements that are different from the labeling the FHSA requires).[8]

B. There Is No Conflict Between The Illinois Supreme Court's Decision And The Ohio Supreme Court's Decision In *Jenkins v. James B. Day & Co.*

Contrary to petitioner's assertion, there is no conflict between the Illinois Supreme Court's decision and the Ohio Supreme Court's decision in *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), because these courts decided the question of FHSA preemption based upon diametrically opposed facts. In *Jenkins*, the Ohio Supreme Court—like the Illinois Supreme Court—was asked to determine whether the FHSA labeling requirements in Section 1261(p) preempt a state law failure to warn claim that alleges labeling

[8] Like the Fourth Circuit, the Fifth Circuit Court of Appeals also has held that the FHSA preempts state law warning requirements, other than those imposed by the FHSA. *Comeaux v. Nat'l Tea Co.*, 81 F.3d 42 (5th Cir. 1996).

defects in the packaging of a methylene chloride paint stripper. *Id.* But the defendant manufacturer in *Jenkins*—unlike AMREP in this case—did not argue and did not introduce evidence that its label is identical to the label the CPSC has determined satisfies the labeling requirements in Section 1261(p). *Id.* Thus, the facts before the *Jenkins* court were so decidedly different from the facts before the Illinois Supreme Court that comparing the legal holdings in these cases is the quintessential comparison of apples and oranges. Indeed, the Ohio court expressly stated that it would have found there was preemption if the defendant in that case had introduced the evidence of FHSA compliance that AMREP introduced in this case. As the *Jenkins* opinion states:

> To the extent that appellee attempts to impose a responsibility on appellant to label Marine-Strip in a more elaborate or different manner than that imposed by the FHSA, we must agree with the *Moss* court that appellee's claim is preempted. *** The court of appeals held that appellee's claims based on labeling were not preempted even if appellant complied with the FHSA. This was error.

69 Ohio St.3d at 547 n.2, 634 N.E.2d at 1003 n.2.

> Although a claim based on a state law standard identical to the labeling requirement of the FHSA is not preempted, summary judgment would still be proper if evidence showed that the label did comply with the FHSA.

69 Ohio St.3d at 549, 634 N.E.2d at 1004. Clearly, there is no conflict between the Illinois Supreme Court's opinion and a decision that states the Ohio court would reach the same holding if it was deciding the same facts.

C. There Is No Conflict Between The Illinois Supreme Court's Decision And This Court's Decisions In *Freightliner Corp. v. Myrick* And *CSX Transportation, Inc. v. Easterwood*.

In both *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court found there was no preemption because the agency promulgation necessary to effect preemption did not exist. This court's interpretations and applications of other statutes with distinctly different preemption provisions do not conflict with the Illinois Supreme Court's determination that under the FHSA, Section 1261(p) of the act itself is sufficient to cause preemption.

In *Freightliner*, this Court held that a judicially suspended safety standard did not expressly preempt plaintiff's cause of action under the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") because that statute's preemption provision only applies " '[w]henever a Federal motor vehicle safety standard . . . is in effect' with respect to the 'same aspect of performance' regulated by a state standard." 115 S.Ct. at 1487. This Court also found there was no implied preemption because it was possible for plaintiff to comply with both the Safety Act and state law. *Id.*

Petitioner argues there is a conflict between the *Freightliner* decision and the Illinois Supreme Court's decision because the voluntary labeling standard the CPSC adopted pursuant to Section 1262(g)(2) of the FHSA can have no greater preemptive effect than the judicially suspended standard in *Freightliner* (Petition at 15). Petitioner's contention overlooks the important differences between these two statutes: the Safety Act's

preemption provision requires that its administering agency promulgate a "standard" that "is in effect"; the FHSA's preemption provision provides that the labeling requirements in Section 1261 of the act itself are sufficient to cause preemption. Thus, the absence of a "standard" under the Safety Act cannot reasonably be equated to the absence of a regulation under the FHSA.

Similarly in *CSX*, this Court decided the preemption issue in the context of a statute that—like the Safety Act in *Freightliner*—expressly provides that preemption occurs only when "a rule, regulation, order, or standard covering the subject matter of such State requirement" has been adopted. 507 U.S. at 662 fn 2. Based upon its determination that no "regulation" had been issued "covering" the same subject matter, this Court found that the Federal Railroad Safety Act ("FRSA") did not preempt plaintiff's negligence claim. 507 U.S. at 668. Again, petitioner's attempt to invent a conflict between the Illinois Supreme Court's finding of preemption under the FHSA and this Court's determination that there was no preemption under the FRSA falls flat. In order to reach petitioner's supposed conflict, it is necessary to completely disregard the fact that the FRSA's preemption provision requires the promulgation of a rule or regulation, while the FHSA's preemption provision does not.

D. The Existence Of An Unresolved State Law Basis For Affirming The Illinois Supreme Court's Decision Is A Compelling Reason Not To Grant Petitioner's Writ.

Finally, although petitioner neglects to advise this Court, there is an independent state law ground, *i.e.*,

waiver, on which the Illinois Supreme Court's decision to affirm the Appellate Court could be upheld. Thus, the effect of this Court's reversal of the Illinois Supreme Court's decision on the federal question petitioner raises would be to remand this case to the Illinois Supreme Court to allow that court to decide the independent non-federal question of whether petitioner waived the federal question this Court decided. 12 J. Moore, H. Bendix, B. Ringle, Moore's Federal Practice ¶511.01 (2d ed. 1995). Clearly, the existence of this independent state law basis for the Illinois Supreme Court's decision is a compelling reason not to grant petitioner's writ.

CONCLUSION

The Illinois Supreme Court did not misapply the Federal Hazardous Substances Act. Nor does its opinion conflict with the decision in *Jenkins v. James B. Day & Co.*, *CSX Transportation, Inc. v. Easterwood*, or *Freightliner Corp. v. Myrick*. Petitioner's efforts to create false conflicts merely evidences the weakness of his petition and underscores the obvious conclusion that the Illinois Supreme Court's opinion does not merit this Court's review.

Respectfully submitted,

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RESPONDENT'S APPENDIX

The Federal Hazardous Substances Act

(15 U.S.C. Section 1261 *et seq.*)

§1261. Definitions

For the purposes of this chapter—

(g) The term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

(n) The term "label" means a display of written, printed, or graphic matter upon which the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise.

Note (b)(1)(B) Effect upon Federal and State law

(B) Except as provided in paragraphs (2), (3) and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [15 USCS §1261(q)] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish

or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

§1262 Declaration of hazardous substances

Publication of submitted standard as proposed regulation

(g)(1) If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (f)(5) of this section if promulgated (in whole, in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a regulation under section 2(q)(1) [15 USCS §1261(q)(1)] of this title or subsection (e) of this section, as the case may be, would eliminate or adequately reduce the risk of injury identified in the notice provided under subsection (f)(1), the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed regulation under such section or subsection.

(2) If the Commission determines—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (f)(6) is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard,

the Commission shall terminate any proceeding to promulgate a regulation under section 1261(q)(1) [15 USCS §1261(q)(1)] or subsection (e) of this section, respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury.

Consumer Product Safety Commission—
Commission Participation And
Commission Employee Involvement In
Voluntary Standards Activities

(16 CFR §1031)

§1031.2 Background.

(b) In 1981, the Congress amended the Consumer Product Safety Act, The Federal Hazardous Substances Act, and the Flammable Fabrics Act, to require the Commission to rely on voluntary standards rather than promulgate a mandatory standard when voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with the voluntary standards. (15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2)).

§1031.4 Effect of voluntary standards activities on Commission activities.

(a)(1) The Commission, in determining whether to begin proceedings to develop mandatory standards under the acts it administers, considers whether mandatory regulation is necessary or whether there is an existing voluntary standard that adequately addresses the problem and the extent to which that voluntary standard is complied with by the affected industry.

(2) The Commission acknowledges that there are situations in which adequate voluntary standards, in combination with appropriate certification programs, may be appropriate to support a conclusion that a mandatory standard is not necessary. The Commission may find that a mandatory standard is not necessary where

compliance with an existing voluntary standard would eliminate or adequately reduce the risk of injury associated with the product, contains requirements and test methods that have been evaluated and found acceptable by the Commission, and it is likely that there will be substantial and timely compliance with the voluntary standard. Under such circumstances, the Commission may agree to encourage industry compliance with the voluntary standard and subsequently evaluate the effectiveness of the standard in terms of accident and injury reduction for products produced in compliance with the standard.

Supreme Court, U.S.
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(3)

No. 95 - 1805

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1995

RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

Petitioner,

vs.

AMREP, INC.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF OF RICHARD BUSCH

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REPLY BRIEF OF RICHARD BUSCH

A. The Illinois Supreme Court failed to understand both the concept of federal preemption and the requirements of the Federal Hazardous Substances Act.

Respondent's defense of the opinion of the Supreme Court of Illinois is a good illustration of the confusion that exists in the law concerning the federal preemption of state tort remedies. Nowhere in Respondent's brief does it address the concept of

the "requirements" of the Federal Hazardous Substances Act that supposedly conflict with Illinois product liability law thus working a preemption of the latter. For reasons that are not readily apparent, Respondent seeks to vilify the Petitioner rather than making its own exposition of what the requirements of the FHSA are. It is only from this starting point that conflicts can be identified between state and federal law that could result in preemption of state law.

Despite Respondent's loud protests and accusations against the Petitioner, there can only be either the general labeling requirement under 1261(p)(1) or a specific requirement established by a lawfully adopted regulation under 1262(b). Regarding warnings for the use of the product Section 1261(p)(1) is plain and unambiguous in requiring that the label contain:

> (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the commission pursuant to section 1262 of this title.

There is absolutely no authority in the statute that permits the Consumer Product Safety Commission to offer opinions as to what may be adequate "precautionary measures describing the action to be followed or avoided." The only way specific language for the use of a product may be mandated is by regulation under Section 1262.

Plaintiff certainly does claim that the existing instructions for Misty were not adequate and that this was the cause of Melissa Busch's death. Adequate instructions for use are clearly mandated by the FHSA; and absent the lawful adoption of a regulation providing for a specific label, what might be "adequate instructions for its use" will be open to interpretation. This is true whether the issue is before a state court hearing a product liability case or a United States District Court hearing an enforcement action against a manufacturer brought by the CPSC.

The clear mistake of the Illinois Supreme Court was to accord the actions of the Consumer Product Safety Commission the force of law. The Court correctly notes that the Plaintiff attempted to impose upon Amrep a warning that would provide "adequate instructions for use," but failed to appreciate that this was identical to the requirements of Section 1261(p)(1) of the FHSA.

After this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), finding federal preemption of state tort remedies has become the easy and expeditious way to dispose of product liability cases without thought or analysis. Both *Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir: 1993), and *Comeaux v. National Tea Co.*, 81 F.3d 42 (5th Cir: 1996), involved flammable products which caught fire causing the plaintiffs' injuries. Both products, paint thinner in *Moss* and lighter fluid in *Comeaux*, were labeled as combustible; and both courts could have as easily reached the result they

did by holding as a matter of law that the labeling was adequate under common law principles. In fact, this is what the trial court in *Comeaux* had done; and it was only when the case reached the Fifth Circuit that preemption was used to give judgment to the defendant.

B. The Facts in *Jenkins v. James B. Day & Co.* are identical to this case.

Respondent argues that *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), is distinguishable on its facts from the case at bar. This is a curious argument considering that both cases involved the deaths of users of products containing methylene chloride where the cause of death was identified as acute methylene chloride intoxication. Further, both cases involved common law product liability actions in which the defense urged that the actions were preempted by the FHSA. As in the case at bar, the defendant in *Jenkins* urged that the plaintiff was attempting to impose duties to warn on it that were broader and in addition to those required by Section 1261(p)(1) of the FHSA and were thus preempted. The court rejected this outright and held:

> Section 1261(p), Title 15, U.S.Code does not specify all the language required on a product's warning label. See *Chem. Specialties Mfrs. Assn. v. Allenby*, (C.A.9, 1992), 958 F.2d 941, 950. A manufacturer of a product formulates its own warning

> language, guided by the FHSA, but the language is not reviewed for adequacy by a federal agency. [FN3] In particular, Section 1261(p)(1)(E), Title 15, U.S.Code requires a label on a hazardous substance to contain "an affirmative statement of the principal hazard or hazards" and Section 1261(p)(1)(F) requires a label to state "precautionary measures describing the action to be followed or avoided." Given that a manufacturer selects its own language to convey this information, to comply with the FHSA a manufacturer must supply a label which provides a reasonably adequate warning to inform a user of the risks involved, and the action to take to avoid those risks. Because this is essentially the same requirement appellee attempts to impose on appellant pursuant to R.C. 2307.76(A)(1), it is "identical to the labeling requirement under section 2(p) [Section 1261(p), Title 15, U.S.Code]" for purposes of the FHSA's preemption clause, Section 1261 note (Effect upon Federal and State law), Title 15, U.S.Code and appellee's claim is not preempted. [FN4] We thus agree with the court of appeals that the trial court erred in granting summary judgment in favor of the appellant on the basis of preemption. (At 634 N.E.2d 1004)

Respondent would make much of the fact that the action of the Consumer Product Safety

Commission regarding methylene chloride was not discussed by the court in *Jenkins*. Respondent argues that if only this had been done the Ohio Supreme Court would have decided the case in the defendant's favor in the same manner as the Illinois Supreme Court. This necessarily supposes that the actions of the Consumer Product Safety Commission were not raised in *Jenkins* and brought to the court's attention. The two potential explanations for this are that defense counsel incompetently failed to discover what the Consumer Product Safety Commission had done or, assuming that counsel was aware of this, had concluded that since no regulation had been adopted mandating a warning for methylene chloride the actions of the CPSC did not have the force of law. It is respectfully suggested that the latter explanation is more reasonable.

C. *Freightliner Corp. v. Myrick* & *CSX Transportation, Inc. v. Easterwood* require that there be positive federal law for preemption to occur.

In attempting to negate the impact of *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), Respondent concedes Petitioner's argument regarding the necessity of positive federal law as a prerequisite to preemption. There is absolutely no difference between the necessity of a "requirement" under the Federal Hazardous Substances Act and the necessity for a safety standard that is in effect under the National Traffic

and Motor Vehicle Safety Act of 1966. Respondent concedes that the voluntary labeling standard adopted by the CPSC does not have the force of law, but argues that the general provisions of Section 1261(p) are sufficient in themselves to extinguish Plaintiff's action. Again, this section only provides that an adequate warning for use of the product be given without specifying what that warning is. Respondent's obligations under both Illinois product liability law and the FHSA are identical. There can be no preemption because it was certainly possible for Respondent to comply both with Illinois common law and Section 1261(p)(1) of the FHSA.

To the same extent the "rule, regulation, order, or standard" considered by the Court in *CSX Transportation, Inc.* under the Federal Railroad Safety Act is identical to the "requirement" under the FHSA in order for there to be preemption. Both statutes require that before preemption can occur there must be a positive expression of federal law which conflicts with state law on the same subject. In the case at bar the Illinois Supreme Court held that Illinois product liability law would conflict with the FHSA simply because the FHSA required an adequate warning for the use of the product without specifying what that warning would be.

D. The Supreme Court of the State of Illinois decided this case exclusively on the federal issue of whether the FHSA preempted the Plaintiff's state tort remedy.

The only question, federal or otherwise, presented by this case is whether the FHSA preempts the Petitioner's state product liability action. This was the basis alleged by Respondent below and upon which the trial court granted the Defendant's summary judgment. This appeal is brought from the judgment of the Supreme Court of the State of Illinois, and nowhere in that Court's opinion is the issue of waiver considered or even the word waiver used. The Respondent is not seriously arguing that there was an adequate and independent state ground that the Illinois Supreme Court relied upon in granting it summary judgment. Rather, Respondent's complaint is that the Supreme Court of the State of Illinois did not accept its arguments that the Plaintiff had waived certain positions at various stages of the case. In any event, the mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that would relieve this Court of the necessity of considering the federal question. *United Airlines v. Mahin*, 410 U.S. 623, 630-31 (1973).

CONCLUSION

The opinion of the Illinois Supreme Court in dealing with the very important doctrine of federal preemption is plainly wrong. This opinion is an open invitation for courts, both state and federal, to further erode the traditional police powers of the states and substantially affect the delicate balance that is

essential in our federal system between state and federal jurisdiction.

It is again respectfully requested that the Court grant the Petition for Writ of Certiorari or, in the alternative, remand this case to the Supreme Court of the State of Illinois for further consideration in light of this Court's opinion to be issued in the case of *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886.

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